(1)

No. __-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WALTER R. KELLY, Superintendent,
Great Meadow Correctional Facility,

Petitioner,

—v.—

CASIM NOBLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a finding of wilful non-compliance necessary under the Sixth Amendment in order to preclude the testimony of a defense witness for a defendant's failure to comply with pre-trial discovery obligations?

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The memorandum decision of the United States District Court for the Eastern District of New York (Sand, D.J.) is reported at 89 F.Supp.2d. 443 (S.D.N.Y. 2000). It is reprinted in the appendix at pp. 15a-58a.

The decision of the New York State Court of Appeals denying the state prisoner's application for leave to appeal to that court from the decision of the Appellate Division, Third Department is reported at 84 N.Y.2d 1036, 623 N.Y.S.2d 192, 647 N.E.2d 464 (1995). The decision of the Appellate Division, Third Department, unanimously affirming the judgment of conviction is reported at 209 A.D.2d 735, 618 N.Y.S.2d 123 (2d Dept. 1994) and reprinted in the appendix at pp. 59a-61a.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On March 12, 1998, Southern District Judge Leonard B. Sand granted the petition and ordered the release of the petitioner if the state failed to re-try him within 90 days of the date of the order. The court stayed the effect of the order granting the writ for the state to appeal.

On April 5, 2001, the Second Circuit, which acquired jurisdiction under 28 U.S.C. sections 1291 and 2253, entered a judgment and opinion affirming the District Court's issuance of the writ. Petitioner's Appendix at 15a (hereinafter "PA").

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

New York Criminal Procedure Law § 250.20:

> Section 250.20 Notice of alibi
>
> 1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the court may extend the period for

service of the notice.

* * *

3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

STATEMENT OF THE CASE

On the evening of October 26, 1989, Casim Noble shot 17-year-old Dwight Usher outside a bar in Kiamesha, New York. Usher was sitting in a car when Noble and two others walked down a nearby hill, approached the car, and asked Usher to come out. When Usher stood up, Noble pulled a gun and fired five shots at him. Four of these shots struck Usher, penetrating his thigh, elbow, groin, and upper chest.

Usher was taken by friends to the local sheriff's office, where a deputy sheriff called an ambulance. Before being taken to the hospital, Usher told the deputy sheriff that he had been shot by Casim, whom he knew and recognized. Troy Leibert, who was standing 30 feet away at the time of the shooting, also identified Noble. He had seen Noble on previous occasions at the bar and knew him as Casim. Usher underwent several operations and survived the attack, suffering numerous gunshot wounds and retaining two bullets inside his body.

State Court Proceedings

Noble was charged in New York State County Court, Sullivan County, with Attempted Murder in the Second Degree, Assault in the First Degree, Criminal Use of a Firearm in the First Degree, and Criminal Possession of a Weapon in the Second Degree. At the trial of these charges, the prosecution presented the testimony of Dwight Usher and Troy Leibert, both of whom identified Noble as the shooter.

After the prosecution rested, Noble attempted to call Steven Yamagata, who, counsel told the court, would testify that Noble was inside the bar at the time of the shooting and therefore could not have committed the assault (PA 65a). The prosecutor objected, arguing that counsel had failed to comply with the discovery provisions of New York Criminal Procedure Law section 250.20 (PA 66a). Under those provisions, once a prosecutor files a proper demand, a defendant who intends to introduce testimony that he was somewhere other than at the scene of the crime must file a notice containing the names and addresses of the relevant witnesses. Under this section, the defendant must file the notice within eight days of the prosecutor's demand. The statute authorizes preclusion of the proffered testimony for failure to comply and requires a three-day adjournment if the court admits the testimony. The prosecutor noted that he had served a demand approximately one and one-half years before trial and that Noble had never supplied the required notice (PA 66a).

Defense counsel argued that he was not required to give the statutory notice. After he explained that the testimony would place Noble inside the bar, the court asked, "Why isn't that an alibi?" (PA 65a). Counsel argued, "Whether it's outside or inside, it's 20 yards away. I'm not putting him in New York City or anything" (PA 66a). Counsel told the prosecutor, "You

can have your three days" (PA 67a). The prosecutor immediately disputed defense counsel's claim, responding that even if "apartment A and Apartment B are in the same location" and only the thickness of a wall apart, a defendant who alleged he was in a different apartment than the one in which the crime took place would be raising an alibi defense (PA 66a).[1]

The trial court rejected defense counsel's argument. The court noted that the witness's testimony would place Noble "behind a door and in a building, and the action occurred or is alleged to have occurred out in the parking lot" (PA 66a) The court therefore precluded Yamagata's testimony to the extent that it would place Noble inside the bar at the time of the crime.[2]

The defense nevertheless was allowed to present the testimony of two witnesses who were outside the bar, Melvin Walker and Ralphalena Andrews, who testified that they saw the assailants and that Noble was not one of them. Both witnesses had previously given contrary statements to the sheriff's office

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[1] Counsel also argued that he properly declined to serve notice because the indictment stated that the crime occurred in the "vicinity"of the bar, but the prosecutor noted, without contradiction, that the bill of particulars and the motion practice indicated that the crime occurred in front of the bar (PA 67a). The court subsequently noted that the prosecutor's response to defense discovery requests indicated the scene of the crime was "in front of the Around the Corner Bar" (PA 68a, 69a-70a).

[2] Counsel also proffered Yamagata's testimony on the issue of whether a fight occurred in the bar earlier on the night of the crime (PA 70a). At the time of trial, Yamagata was in custody and represented on pending drug indictments by the same attorney who represented Noble. These charges were not pending at the time of the incident in this case.

identifying Noble as one of the three men who had committed the crime.

Noble was convicted on all counts. He was sentenced to concurrent terms totaling 12½ to 25 years in jail.

Noble appealed to the New York State Appellate Division, Third Department, arguing, among other things, that the court improperly precluded Yamagata's testimony and that trial counsel was ineffective. The appellate court affirmed the conviction. *People v. Noble*, 209 A.D.2d 735, 618 N.Y.S.2d 123 (3d Dept. 1994). It declined to rule on the preclusion issue, finding any error in this regard harmless, and rejected the argument that counsel was ineffective. On January 30, 1995, a Judge of the New York Court of Appeals denied leave to appeal. *People v. Noble*, 84 N.Y.2d 1036, 623 N.Y.S.2d 192, 647 N.E.2d 464 (1995) (Bellacosa, J).

Federal Court Proceedings

Noble subsequently brought a proceeding for a writ of habeas corpus in federal court. In the petition, Noble argued that the trial court violated the Sixth Amendment's Compulsory Process Clause by precluding Yamagata's testimony and that counsel was ineffective for several reasons, including failing to file the required notice. The state responded that the petition was untimely, that Noble's federal constitutional claims were unexhausted, that the trial court properly precluded Yamagata's testimony, and that counsel was effective.

The District Court granted the petition on February 28, 2000. *Noble v. Kelly*, 89 F.Supp.2d 443 (S.D.N.Y. 2000) (Sand, D.J.). After holding that the petition was timely filed and Noble had properly exhausted his claims, the District Court

concluded that the trial court's preclusion of Yamagata's testimony violated the Compulsory Process Clause. The Court analyzed this Court's decision in *Taylor v. Illinois*, 484 U.S. 400 (1988) and held that the trial court's failure to make a finding of wilfulness in this case, as was present in *Taylor*, rendered the court's action constitutionally invalid. The court also found that the error was not harmless. The court, accordingly, issued a conditional writ of habeas corpus providing that Noble be released within 90 days if not re-tried by the state.[3]

The state appealed to the Second Circuit. With regard to the preclusion issue, the state argued that a finding of wilfulness was not a pre-requisite under the Sixth Amendment to precluding the testimony of a witness for the failure to comply with discovery obligations. Brief for Appellant, 2d Cir. No. 00-2154 at 15-18. The state also argued that counsel's wilfulness was established by the fact that counsel had ample notice of the place of alleged commission of the crime outside the bar, that counsel had long had access to Yamagata because counsel had represented Yamagata for months on his pending drug case, and that counsel's colloquy demonstrated that he was experienced and knew full well the scope of the alibi notice statute. *Id.* at 18-21. The state also noted that the trial court could have legitimate concerns over the testimony because it was offered at the eleventh hour, and the alleged alibi witness and Noble spent several months together prior to trial in the Sullivan County Jail. *Id.* at 20 n.3,d 28. The state also argued that an adjournment would have done little or nothing to avoid

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[3] The court also held that counsel had been ineffective for the sole reason that he had failed to file a notice of alibi. Although the court had found in assessing the Compulsory Process claim that counsel possessed a good faith belief that he did not have to file a notice, the court nevertheless concluded that counsel's decision not to file the notice constituted ineffective assistance of counsel.

prejudice because it would not have allowed the prosecutor to interview Yamagata, who had pending indictments and was represented by Noble's attorney in those cases. *Id.* at 21-23. Finally, the state argued that any error was harmless. *Id.* at 24-31.

Noble argued that the District Court correctly determined that the trial court had precluded Yamagata's testimony in violation of the Compulsory Process Clause. Noble acknowledged that the application of *Taylor v. Illinois* required a sensitive weighing of the right to present a defense against countervailing public interests and that the preclusion sanction had to be judged on a case-by-case basis. *See* Brief for Appellee, 2d Cir. No. 00-2154, at 20-21. He then argued that counsel had not acted wilfully but acted out of an honest belief that he did not have to file the notice, and that the trial court was required to grant a short adjournment rather than preclude the testimony. *Id.* at 25-27. Noble also argued that the trial court's decision was, under the deferential standard of AEDPA as explained in *Williams v. Taylor*, 120 S.Ct. 1495 (2000), "contrary to" and "an unreasonable application of" *Taylor v. Illinois.* Finally, Noble asserted that the trial court's error was not harmless.

On April 5, 2001, the Second Circuit affirmed the District Court's judgment granting the petition. *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001). The Second Circuit held that the trial court's preclusion of the testimony of the witness violated the Compulsory Process Clause absent a finding that counsel acted wilfully in failing to file the alibi notice. Going beyond the position taken by Noble that *Taylor v. Illinois* required a sensitive weighing of countervailing interests in each individual case, the Second Circuit promulgated a rule requiring a finding of wilfulness as a pre-requisite to preclusion in every case in which prejudice could be "minimized with relative ease" through

other means. 246 F.3d at 100 and n. 3 ("we . . . conclude that where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony *must be supported by a finding of some degree of wilfulness* in defense counsel's violation of the applicable discovery rules") (emphasis added). The court then declined to return the case to the District Court for a finding on the issue of whether counsel acted wilfully, and instead determined, based on the record before it, that counsel had not acted in bad faith and that defendant's Sixth Amendment rights had therefore been violated. *Id.* at 100-101. The Second Circuit also held that it would come to the same conclusion whether or not it used AEDPA's deferential standard of review, the applicability of which the court declined to consider. *Id.* at 98. Finally, the court ruled that the error was not harmless and affirmed issuance of the writ on this ground.[4] *Id.* at 101.

Judge Jacobs wrote separately, concurring in the majority opinion as to all points but dissenting on the issue of the appropriate remedy. *Id.* at 102-03. Judge Jacobs favored a remand to the District Court for a hearing on the issue of wilfulness because the record was sufficiently ambiguous to warrant it. *Id.* at 102. Judge Jacobs noted that defense counsel was an experienced criminal defense lawyer who undoubtedly knew that Yamagata's testimony was of a kind that would be most valuable if the government was surprised and lacked an opportunity to prepare for it. *Id.* He also noted that Noble and Yamagata had the same attorney and that they were "friends from prison days." *Id.* He believed that at a hearing a court

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[4] In light of its affirmance on the Compulsory Process ground, the Second Circuit did not consider the District Court's alternative basis for issuing the writ that counsel was ineffective. 246 F.3d at 101 n. 4. The court also held that the District Court had correctly held that the petition was timely filed. *Id.* at 97-98.

might find that Yamagata's name was withheld deliberately, at least until counsel concluded that Yamagata could no longer effectively be interviewed by the prosecution because counsel had come to represent both men. Finally, Judge Jacobs, citing this Court's language in *Taylor* regarding the ease with which an eleventh-hour alibi can be concocted, urged that a new trial not be mandated unless it was clear that constitutional error had occurred.

Petitioner now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

Summary of Argument

In the thirteen years since this Court's decision in *Taylor v. Illinois*, 484 U.S. 400 (1988), lower courts have divided sharply on the question of whether a defendant's failure to comply with discovery obligations can result in preclusion of a defense witness in the absence of a finding that the defendant or his attorney acted wilfully to gain a tactical advantage. Some courts have concluded from the *Taylor* Court's statement that preclusion would be "appropriate" in such circumstances that wilfulness is a pre-requisite to preclusion in all, or a specifically defined sub-category, of cases. Other courts have read *Taylor* to impose a weighing or balancing test, leaving a case-by-case assessment of the factors in the discretion of the trial court in the first instance, subject to re-evaluation on appeal. This case presents the Court with an opportunity to resolve this long-standing controversy and provide guidance to lower courts that have the difficult task of sorting through the divergent lines of authority and making a prompt decision that will withstand later

scrutiny.

The critical need for resolution of this issue is demonstrated both by the depth of the division of authority and the nationwide breadth of the issue. In the federal courts, the split of authority divides the Eighth, Ninth, and now Second Circuit Courts of Appeals, which have required a showing of wilfulness as a pre-requisite to preclusion in some or all cases, from the First, Sixth, Seventh, Tenth, and District of Columbia Circuits, which have imposed a multi-factor test in lieu of any rigid rules. Indeed, at least three federal circuit courts of appeals have expressly noted the split of authority among the circuits on this issue. Nor has the controversy been confined to the federal courts. The same division is reflected among the state courts of last resort to have considered the issue, which continue to issue decisions falling on both sides of the question in the absence of guidance from this Court.

Moreover, these cases only begin to suggest the potential reach of this issue. Over forty states now have notice-of-alibi rules similar to the New York rule at issue here. Almost all of these rule expressly authorize, and some even command, preclusion upon a defendant's failure to comply with the rules without adequate cause, and none of the rules expressly require a showing of wilfulness as a pre-requisite to preclusion in any category of cases. In addition, the Federal Rules of Criminal Procedure, which of course govern federal prosecutions nationwide, also contain notice of alibi provisions almost identical to the New York rule. And these state and federal notice of alibi rules are but one species of reciprocal discovery provisions, which impose many different discovery obligations on defendants and exist in some form in all states.

Furthermore, the Second Circuit rule and those of other circuits requiring a showing of wilfulness cannot be squared

with this Court's decision in *Taylor*. While this Court held that preclusion would be appropriate in cases of wilful non-compliance, it by no means made a showing of wilfulness a pre-requisite to preclusion. To the contrary, the Court set out a test under which many factors would "weigh in the balance," and cited to a lower court decision applying a balancing test as an example of the careful assessment of the many relevant factors. *Id.* at 415 n.19. The Second Circuit categorical rule is inconsistent with this test and fails to require, or even on its face permit, inquiry into many relevant considerations, including some specifically identified in *Taylor*.

Finally, there is a pressing need for resolution of this issue for both defendants and prosecutors. If, in fact, a showing of wilfulness is required under the Sixth Amendment, then many jurisdictions are depriving defendants, and juries, of testimony relevant to the defense without adequate cause. If wilfulness is not required, however, then many convictions are needlessly being overturned, even though the trial court, which is in the best position to evaluate the factors at issue, has made a correct assessment and justly precluded the testimony. Because the current indecision in the state of the law benefits no one and because the question has such far-reaching consequences, the issue warrants this Court's review.

I. As Has Been Noted by at Least Three Federal Circuit Courts of Appeals, There Is a Split of Authority among the Circuits and among State Courts of Last Resort over Whether a Finding of Wilfulness Is Necessary to Preclude the Testimony of a Defense Witness for a Discovery Violation.

No fewer than eight federal circuit courts have spoken on the issue of whether a finding of wilfulness is required in order to preclude defense testimony for the failure to comply

with reciprocal discovery provisions. These courts have, however, been unable to agree on an answer. Indeed, at least three federal circuit courts have expressly noted the split of authority. Because the issue presents an increasingly unsettled issue of law that can only be resolved by this Court, it is worthy of this Court's review.

The majority of federal circuit court decisions addressing the issue adopt a balancing test, based on the considerations outlined in *Taylor*, rather than a "bad faith" or wilfulness requirement. For example, in *United States v. Johnson*, 970 F.2d 907, 910-12 (D.C. Cir. 1992), the District of Columbia Circuit upheld the preclusion of a defense witness for failure to comply with the alibi notice provisions of Federal Rule of Criminal Procedure 12.1, even though the District Court had found that defense counsel had not acted in bad faith. The D.C. Circuit, noting the split of authority on this issue, specifically declined to adopt a bad-faith requirement for preclusion, holding that such a requirement "would be inconsistent with the *Taylor* Court's reference to trial court discretion and its extended discussion of the relevant factors." *Id.* at 911. The court observed that, while the *Taylor* court noted that the discovery violation in that case was wilful and blatant, "the opinion certainly did not say that such findings were essential." *Id.* The court also rejected the defendant's argument that the trial court should have granted an adjournment that could have avoided prejudice, holding that this less restrictive alternative was not mandated even in the absence of a finding of wilfulness.

Similarly, the Seventh Circuit in *Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996), upheld a state conviction despite the preclusion of a defense witness for a violation of state reciprocal discovery order and despite the fact that it determined that the violation was not willful. Once again citing the split of authority among the

Circuit Courts on this issue and noting that *Taylor* left the issue open, the Court held, "We do not think a hard and fast rule to govern [such cases] is feasible or desirable." *Id.* The court continued, "Given the competing considerations identified above, the highly situation-specific character of the judgment that the trial judge is called upon to make in the hurly-burly of trial, . . . we do not consider it the proper office of a federal court . . . to second guess a discovery ruling unless we are convinced, in the circumstances, that it is unreasonable." *Id.* The court then reiterated that the test to be applied was "reasonableness in the circumstances." *Id.* at 446.

Likewise, the Tenth Circuit has upheld the preclusion of defense witnesses for the failure to comply with discovery obligations absent a showing of wilfulness, adopting a multi-factor balancing test instead of a rigid rule. For example, in *United States v. Russell*, 109 F.3d 1503 (10th Cir.), *cert. denied*, 521 U.S. 1126 (1997), the Tenth Circuit upheld the District Court's preclusion of a defense witness where counsel was "at least negligent" in his conduct by applying a multi-factor balancing test that it had derived from *Taylor* in a previous case. In *United States v. Pearson*, 159 F.3d 480, 484 (10th Cir. 1998), *cert. denied*, 530 U.S. 1268 (2000), the Tenth Circuit upheld, under an abuse-of-discretion standard, the preclusion of a witness for the failure to comply with Federal Rule of Criminal Procedure 12.1, even though counsel had acted diligently and the defendant was described as acting with "negligence." *Id.* at 483-84. *See also United States v. Davis*, 40 F.3d 1069 (10th Cir. 1994) (upholding exclusion of evidence for failure to comply with federal alibi-notice rule even though counsel did not know of alibi witness name until one week before trial), *cert. denied*, 514 U.S. 1018 (1995). And, in a case decided after the District Court's order in this case, the Tenth Circuit upheld a state court's preclusion of a defense witness for failing to comply with alibi notice rules even though counsel's conduct

was inadvertent. *Watley v. Williams*, 218 F.3d 1156, 1159-60 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 809 (2001). The Tenth Circuit, applying the AEDPA deferential standard that the Second Circuit purported to apply here, held that the state court's application of its alibi notice rule to inadvertent conduct was reasonable under *Taylor v. Illinois*. *Id.*

And the First Circuit too has applied a balancing test to determine the constitutional validity of preclusion for a defendant's failure to give proper alibi notice, rather than setting down any rigid rule requiring wilfulness. For example, in *United States v. Levy Cordero*, 67 F.3d 1002, 1013-15 (1st Cir. 1995), *modified*, 1995 U.S. App. LEXIS 31825, *cert. denied sub nom Forty-Estremera v. United States*, 517 U.S. 1162 (1996), the Court outlined the factors to be considered "in the balance," and examined these factors in detail in assessing the constitutional validity of the District Court's preclusion of alibi evidence for failure to comply with a District Court order. *See also United States v. Portela*, 167 F.2d 687 (1st Cir. 1999) (noting split of authority and stating, "We, however, have never held that willfulness is the sole predicate of an exclusionary sanction"); *Chappee v. Vose*, 843 F.2d 25, 29 (1st Cir. 1988) (stating that *Taylor* declined to cast a mechanical standard; cited with approval in *Portela*).

Similarly, the Sixth Circuit has expressly adopted a balancing test, requiring a weighing of factors outlined in *Taylor*, rather than a rule requiring a showing of wilfulness in any set category of cases. In *United States v. Hamilton*, 128 F.3d 996 (6th Cir. 1997), in upholding the District Court's preclusion of defense evidence for the failure to comply with discovery obligations, the Sixth Circuit observed, "The majority of courts find that *Taylor* requires a balancing test, weighing the defendant's right to present evidence in his defense against countervailing public interests, such as the court's need to

preserve the integrity of the trial process." *Id.* at 1002 (citations omitted). The circuit court went on to weigh the *Taylor* factors, citing the First Circuit's decision in *Chappee v. Vose*, 843 F.2d at 29-30, for the proposition that an appellate court may "reweigh the elements of the *Taylor* test." *Id.*

Thus, at least five federal circuit courts have adopted the position that *Taylor* requires a weighing of factors in each individual case rather than a rigid rule requiring a showing of wilfulness in all cases or any set category of cases. Several circuit courts, however, have come to a different conclusion. In *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991), for example, the Ninth Circuit applied a rule purportedly derived from *Taylor* that would uphold "the drastic remedy of excluding a witness only in cases involving 'wilful and blatant discovery violations." *Id.* at 937 (quoting *Taylor*). The court concluded that no wilful or blatant violation of the discovery rules occurred in the case before it, and it held that the District Court violated the defendant's Sixth Amendment rights when it excluded a witness for a failure to comply with Federal Rule of Criminal Procedure 16, which requires defense disclosure of expert witnesses. *But see People of the Territory of Guam v. Palomo*, 937 F.2d 368, 374 (9th Cir. 1994) ("In *Peters*, we concluded that it was improper to exclude an expert witness *in the absence of an underlying discovery violation.*") (emphasis added). Similarly, in *Anderson v. Groose*, 106 F.3d 242 (8th Cir.), *cert. denied*, 521 U.S. 1108 (1997), the Eighth Circuit applied a rule that it derived from *Taylor* requiring a showing of wilfulness, and issued a writ of habeas corpus because "[n]o court in this case has found, nor is there anything in the record to indicate, that trial counsel was wilful in her noncompliance with the discovery rules." *Id.* at 246.

This same split of authority is reflected in the state courts of last resort that have considered the issue. A majority

of these courts appear to have adopted a balancing test in evaluating the propriety of exclusion for the failure to comply with defense discovery obligations, rather than a requirement of wilfulness. *See Lawson v. State*, 994 P.2d 943, 946-47 (Wy. 2000) (applying balancing test and reviewing for an abuse of discretion); *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061, 1071-71 (1998) (applying four-factor balancing test derived from *Taylor* to uphold preclusion), *cert. denied*, 525 U.S. 1157 (1999); *Commonwealth v. Durning*, 406 Mass. 485, 548 N.E.2d 1242, 1249 (Mass. 1990) (continuing use of pre-*Taylor* five-factor balancing test to uphold preclusion); *People v. Pronovost*, 773 P.2d 555, 557-60 (Colo. 1989) (applying five-factor balancing test); *State v. Edwards*, 153 Vt. 649, 569 A.2d 1075 (1989) (applying balancing test derived from *Taylor*); *McCarty v. State*, 763 P.2d 360, 362-64 (N.M. 1988) (applying multi-factor balancing test); *see also State v. Cromlish*, 2001 N.H. LEXIS 72, *5-6, *12-17 (N.H. April 13, 2001) (applying multi-factor balancing test under state constitution, although noting that no difference between state and federal law exists on this issue); *People v. Morgan*, 142 Ill.2d 410, 568 N.E.2d 755 (1991) (upholding exclusion in discretion of trial judge without finding of wilfulness), *rev'd on other grounds*, 504 U.S. 719 (1992). And, of course, New York has never required a finding of wilfulness as a pre-requisite to preclusion for the failure to comply with a discovery violation. *See, e.g., People v. Almonor*, 93 N.Y.2d 571, 693 N.Y.S.2d 571, 715 N.E.2d 1054 (1999); *People v. Castro*, 263 A.D.2d 373, 695 N.Y.S.2d 306 (1st Dept. 1999); *People v. Houston*, 220 A.D.2d 451, 631 N.Y.S.2d 930 (2d Dept. 1995); *People v. Morris*, 220 A.D.2d 808, 632 N.Y.S.2d 231 (3d Dept. 1995); *People v. Marshall*, 170 A.D.2d 463, 565 N.Y.S.2d 551 (2d Dept. 1991).

Other state courts of last resort have, however, interpreted *Taylor* to require a finding of wilfulness in some or all cases. *See, e.g., State v. Snodgrass*, 207 W. Va. 631, 535

S.E.2d 475, 478 (2000) (stating that preclusion allowed where violation of rule was wilful and reversing because of absence of evidence of wilfulness); *White v. State*, 973 P.2d 306, 311 (Ok. 1998) (stating that excluding *material* defense witness is only appropriate when the discovery violation is wilful and motivated by desire to obtain a tactical advantage); *Skaggs v. State*, 676 So.2d 897, 903 (Miss. 1996) (stating that radical sanction of preclusion reserved for cases in which defendant "participates significantly in some deliberate, cynical scheme to obtain a substantial tactical advantage"); *State v. Begin*, 652 A.2d 102 (Me. 1995) (noting that other jurisdictions allowed exclusion only as a sanction for a willful violation of discovery rules and finding no such wilful violation in the case before it).

The Second Circuit has now become the most recent entrant in this controversy, rejecting any case-by-case balancing of the factors identified in *Taylor* in favor of a rule that makes a showing of wilfulness a pre-requisite to preclusion, at least in a substantial, specifically-defined category of cases. Indeed, the court made clear that it would require a finding of wilfulness as a predicate for preclusion whenever prejudice to the prosecution could be "minimized" by any other means. By imposing a specific requirement of wilful non-compliance and rejecting a case specified balancing test, the Second Circuit directly aligned itself against the decisions of the First, Sixth, Seventh, Tenth, and D.C. Circuits. Thus, although the Second Circuit arrived at a somewhat different ruling than the Eighth and Ninth Circuits, the Second Circuit nonetheless squarely placed itself in the middle of the controversy.

Moreover, as a practical matter, the Second Circuit rule will have the same effect as a rule requiring a showing of wilfulness in every case. Indeed, as this Court noted in *Taylor*, it can almost always be argued that prejudice to the prosecution can at least be minimized by granting the prosecution a

continuance. 484 U.S. at 414. In almost all cases, an adjournment will at least give the prosecution an opportunity to investigate the witness, even though this may not eliminate the prejudice entirely. And very often it will be difficult to prove that any prejudice accrued, much less that it could not be minimized. Thus, the Second Circuit holding in this case will effectively impose a finding of wilfulness as a pre-requisite to preclusion in virtually all cases.[5]

Thus, the Second Circuit's ruling on the necessity of a showing of wilfulness as a predicate to preclusion in so many cases aligns the Second Circuit squarely against those courts that have read *Taylor* to require a case-by-case balancing or weighing test. Furthermore, the Second Circuit's requirement threatens the application of the prevailing rules in the state courts within its jurisdiction, which have no such requirement,

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[5] The application of the Second Circuit's rule in this case demonstrates that the proviso that the court imposed will not serve to limit the application of the wilfulness requirement in any meaningful way. In this case, the prosecution had a strong argument that counsel's failure to give notice created irremediable prejudice. At the time counsel served notice, the alibi witness, Yamagata, had pending drug indictments on which he was represented by the same attorney who represented Noble. This, of course, made any meaningful communication with Yamagata virtually impossible at that time. Had counsel, however, served a timely notice of alibi, within a few weeks after arraignment, Yamagata would not yet have been charged in his drug matters and would not yet have been represented by counsel. Nevertheless, the Second Circuit held that prejudice could be "minimized" by an adjournment to allow the prosecution to investigate, and that therefore the prosecution was required to establish that defendant acted wilfully. If, as the Second Circuit held, the wilfulness requirement applies here, then it would indeed apply in virtually all cases.

and adds to the growing nationwide controversy that only this Court can resolve.

Moreover, the controversy over this issue presents a particularly pressing need for resolution for additional reasons. The subject matter of the controversy is one of critical concern to all parties in the criminal justice system and, of course, to this Court as well. It affects one of the most fundamental rights of the defendant – the defendant's right to present relevant evidence – and bears directly on the truth-seeking function of the trial. It also directly affects the states' ability to ensure the accuracy and fairness of the trial by requiring full pre-trial discovery and eliminating surprise. And this Court has, in fact, specifically emphasized in many cases both its concern for the protection of a defendant's right to present a defense, and the substantial value of reciprocal discovery provisions. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Taylor*, 484 U.S. at 410-11, 414-18; *Wardius v. Oregon*, 412 U.S. 470, 474 (1973); *Williams v. Florida*, 399 U.S. 78, 85 (1970).

Furthermore, in light of the significance of the issue to all parties, the disparity in treatment in different jurisdictions is all the more disturbing. If, in fact, wilfulness is a pre-requisite to preclusion, then jurisdictions allowing preclusion on lesser grounds are unjustifiably distorting the truth-seeking process and permitting the conviction of possibly innocent defendants. If wilfulness is not a predicate to preclusion, then many state and federal convictions will be placed in jeopardy due to erroneous post-trial determinations as to the propriety of orders of preclusion that were issued to vindicate compelling state interests. Neither result is justifiable.

Finally, as the divergent holdings of the cases cited above make clear, this is an issue that cannot be resolved in the absence of further guidance from this Court. Nor will the issue

recede from view or diminish in importance. Indeed, in the past year and one-half alone, the Tenth and Second Circuits have issued decisions falling on different sides of the issue, as have several courts of last resort. This promises further divisiveness in the future and makes the need for review all the more pressing.

II. The Issue Presented by This Case is of One of Broad National Significance in that It Affects the Preclusion of Defense Witness Testimony under the Reciprocal Discovery Provisions of Over Forty States and the Federal Rules of Criminal Procedure.

The potential reach of a decision in this case extends well beyond what can be gleaned from the federal circuit courts and state courts of last resort that have directly considered the issue. The full breadth of the issue, and its nationwide significance, are demonstrated by the pervasiveness and variety of reciprocal discovery rules throughout the states and under the Federal Rules of Criminal Procedure.

Notice of alibi rules such as the ones at issue in the case are now in force in over forty states. *See* Alaska Crim. R. 16(c)(5) (2001); Ariz. R. Crim. Proc. 15.2(b), 15.7(4) (2001); Colo. Rev. Stat. § 16-7-102 (2000); Colo. R. Crim. Proc. 16(II)(d), (III)(g) (2001); Conn. Sup. Ct. Rules § 40-21 (2001); Fla. R. Crim. Proc. 3.200 (2001); Code Ga. Off Ann. 17-16-5 (2001); Hawaii R. of Penal Proc. 12.1 (2001); Idaho Code 19-519 (2000); Ill. Sup. Ct. R. 413 (2000); Indiana Code 35-36-4.1 and 4.3 (2000); Iowa R. of Crim. Proc. 10(11) (2001); Kansas Stat. 22-3218, 38-1623 (2000); La C.Cr. Proc. Art. 727 (2001); Maine R. of Crim. Proc. 16A(B)(3) (2000); Md. Rule 4-263(d)(3) (2001); Mass. R. Crim. Proc. 14(b)(1) (2000); Mich. Stat. Ann. 28.0443(20)(1), 28.1043(20) (2000); Minn. R. Crim. Proc. 9.02(3)(c) (2000); Miss. U.R.C.C.C. 9.05 (2001);

Missouri Sup. Ct. R. 25.05(A)(5) (2001); Mont. Code Ann. 46-15-323, 46-15-329(4) (2000); R.R.S. Neb. 29-1927 (2001); Nev. Rev. Stat. §174.233 (2000); N.H. Super. Ct. R. 100 (2000); N.J. Court R. 3:12-2 (2000); N.M. Dist. Ct. R. Crim. Proc. 5-508 (2000); N.Y. Crim. Proc. L. § 250.20 (2001); N.D. R. of Crim. Proc. 12.1 (2001); Ohio R. Crim. Proc. 12.1 (2001); Oregon Rev. Stat. 135.455 (1999); Pa. R. Crim. Proc. 305(c)(1) (2000); S.C. R. Crim. Proc. 5(e) (1999); S.D. Cod. Laws 23A-9-1 (2001); Tenn. R. Crim. Proc. 12.1 (2001); Utah C. Crim. Proc. 77-14-2 (2000); Vt. R. Crim. Proc. 12.1 (2001); Va. Sup. Ct. R. 3A:11(c)(2) (2000); Wash. Cr. R. 4.7(b)(xii) (1999); W.Va. R. Crim. Proc. 12.1 (1999); Wis. Stat. 971.23(8) (2000); Wyoming R. Crim. Proc. 12.1 (2001); *see also* 34 L.R.P.A. Ap. 2 R 74; R.C.M. 701(b)(2). Almost all of these provisions expressly authorize preclusion as a remedy, and none of them require, by their terms, a finding that counsel acted wilfully in order to impose such a remedy.

Similarly, the Federal Rules of Criminal Procedure also impose an obligation on defendants to serve notice of an alibi defense. F.R.Cr.P. 12.1. That rule, which is virtually identical to the New York statute in its requirements, expressly authorizes preclusion and, as demonstrated above, has frequently been used to preclude alibi witnesses without a prior finding of wilfulness. *See United States v. Pearson*, 159 F.3d at 483-84; *United States v. Davis*, 40 F.3d at 1075-76.

Moreover, alibi notice rules are but one small category of reciprocal discovery provisions that are now commonplace nationwide. The Federal Rules of Criminal Procedure, for example, require not only notice of alibi defenses, but also notice of the use of an insanity defense and the use of a defense based upon public authority. *See* F.R.Cr.P. 12.2, 12.3. The Federal Rules also provide for pre-trial disclosure of documents and tangible objects that the defense intends to introduce at trial,

reports of examinations and tests by defense witnesses, and notice of the intent to rely on expert testimony. F.R.Cr.P. 16(b). All of these provisions expressly authorize preclusion of defense testimony as a remedy for non-compliance, and all have been interpreted since *Taylor* to permit preclusion without a prior finding of wilfulness. *See United States v. Johnson*, 219 F.3d 349, 358 (4th Cir.) (Rule 16), *cert. denied*, 121 S.Ct. 593 (2000); *United States v. Word*, 129 F.3d 1209, 1212 (11th Cir. 1997) (Rule 12.2); *United States v. Nash*, 115 F.3d 1431, 1439-40 (9th Cir. 1997) (Rule 16); *United States v. Seeright*, 978 F.2d 842, 848-49 (4th Cir. 1992) (Rule 12.3); *United States v. Cervone*, 907 F2d 332, 345-47 (2d Cir. 1990) (Rule 12.2).

State jurisdictions too have enacted a vast array of reciprocal discovery provisions. Almost all states have provisions like the federal rule requiring the defendant to give advance notice if he intends to rely upon the defense of insanity. Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* § 20.5(c) (1999). These provisions generally apply broadly to require notice of any form of psychiatric defense. LaFave, Israel, and King, § 20.5(d); *see People v. Almonor*, 93 N.Y.2d at 578-81, 693 N.Y.S.2d at 866-68, 715 N.E.2d at 1058-61. Roughly half the states also authorize court-ordered disclosure of the names and addresses of all the witnesses that the defendant intends to call at trial. LaFave, Israel, and King at §20.5(e); *see, e.g.*, Cal. Penal Code 1054.3 (2001); Fla. R. Crim. Proc. 3.220(d)(1)(A) (1999). And almost all jurisdictions with general discovery provisions in criminal cases authorize pre-trial discovery of documents and tangible objects that the defense intends to introduce at trial, as well as pre-trial discovery of reports and results of medical examinations, scientific tests, and experiments performed by defense witnesses. LaFave, Israel and King, at §20.5(g) and (h); *see, e.g.*, Conn.Super.Ct.R. 40-26(1) (1999); N.Y.Crim.Pro.L. §240.30 (2001). Other reciprocal discovery provisions include discovery

of prior written or recorded statements of defense witnesses, LaFave, Israel and King, at §20.5(f); *see, e.g.*, N.Y.Crim.Pro.L. §§ 240.44, 240.45(2); Fla.R.Crim.Pro. 3.220(b)(1)(B)(i), and provisions requiring notice of specific defenses other than alibi and insanity, LaFave, King, and Israel at §20.5(d); *see, e.g.*, N.Y. Crim. Proc. L. § 250.30 (2001); Ill.Sup.Ct.R. 413(d).

These many and varied reciprocal discovery provisions are invoked on an almost daily basis nationwide, and routinely present trial courts with the question of whether to preclude testimony for non-compliance. In light of the conflicting case law, these courts must decide whether a finding of wilfulness is a pre-requisite to preclusion in some or all cases. But trial courts cannot reliably resolve this question under the current state of the law. For this reason, and because ensuring that these many state and federal reciprocal discovery provisions are applied in a constitutional manner is of the utmost importance, this Court should grant certiorari.

III. The Second Circuit's Rule Is Inconsistent with *Taylor v. Illinois* and Fails to Accord Consideration to Relevant, and Indeed Critical, Concerns in Determining the Propriety of Preclusion.

The rules adopted by the Second Circuit and the other circuit courts requiring a showing of wilful non-compliance for preclusion cannot be squared with this Court's decision in *Taylor v. Illinois*. In that case, this Court specifically eschewed any categorical rule for determining the validity of an order of preclusion for a defendant's failure to comply with discovery obligations, and instead adopted a balancing test in which competing considerations would be evaluated and weighed against each other. The Second Circuit's rule imposing a showing of wilfulness as a pre-requisite to preclusion in virtually all cases is inconsistent with this analysis, and fails to accord

sufficient consideration, indeed any consideration, to matters that are not only relevant, but essential, in the determination of whether preclusion is appropriate.

In upholding the preclusion sanction in *Taylor*, this Court did not impose wilfulness as a pre-requisite to preclusion in all or any defined category of cases. Indeed, it held that "it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." 484 U.S. at 414. Instead, it identified several considerations that must "weigh in the balance," including "the integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. As an example of the balancing that the Court envisioned, the Court cited to *Fendler v. Goldsmith*, 728 F.2d 1181, 1188-90 (9th Cir. 1983), and specifically noted that the court in that case gave consideration to multiple factors, including "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise and prejudice, and whether the violation was wilful." *Id.* at 415 n.19. The *Taylor* Court thus unquestionably contemplated that lower courts would apply a balancing test, taking all relevant considerations into account, to "guide the exercise of [the trial court's] discretion" in the individual case. *Id.* at 414.

The Second Circuit, however, has created a categorical rule, which it has imposed on the states, requiring a showing of wilfulness as a pre-requisite to preclusion in almost all cases. According to the Second Circuit, wilfulness is required whenever prejudice to the prosecution can be "minimized" by other means. This holding is objectionable, and defies *Taylor*,

in many respects. First, and most obviously, it imposes a pre-requisite to preclusion in an entire category of cases when this Court envisioned no such categorical rule. Like the rules in other circuits requiring a showing of wilfulness, the Second Circuit's categorical rule cannot be harmonized with this Court's concern that the many competing considerations be carefully weighed.

Second, as noted above, while purporting to limit the scope of the wilfulness requirement, the Second Circuit's rule in fact extends the requirement to almost all, if not all, cases. As this Court noted in *Taylor*, prejudice to the prosecution can always be "minimized" by granting an adjournment to allow investigation or by lesser means than preclusion. *Id.* at 413. Moreover, the *Taylor* Court specifically upheld preclusion despite the availability of such lesser remedies for minimizing prejudice, noting that while these remedies are always available, they are often not the most effective remedies. Thus, the Second Circuit's justification for imposing a requirement of wilfulness on the basis of the availability of such remedies is also inconsistent with *Taylor*.

Third, the Second Circuit rule fails to acknowledge that even when alternative remedies exist to "minimize" prejudice, some prejudice may result that is irremediable. For example, in this case, at the time the defense attempted to call Yamagata, he was represented on pending cases by the same attorney as Noble. Had Noble served timely notice, however, the witness would not then have been represented by Noble's attorney and the likelihood of obtaining some statement from the witness would have been much greater. The failure to serve notice, or to even mention Yamagata as a potential witness, until the eve of trial, effectively precluded any such interview. Lasting prejudice of this type surely deserves some consideration even when other alternatives exist, as in this case, to "minimize"

prejudice.

Fourth, the Second Circuit's rule, like the absolute rules expressly requiring a showing of wilfulness in all cases, fails to recognize that there exist significant variations in culpability short of a definitive showing of wilfulness. As many courts have acknowledged, there exists a considerable difference between a few days delay in complying with a statute that requires service of a notice upon arraignment when counsel has newly entered the case, and a delay of years until the eve of trial that is unexplained or justified by a weak excuse. *See e.g., People v. Pronovost*, 773 P.2d at 558 (requiring inquiry into degree of culpability associated with failure to timely file). While a court may not be convinced that counsel or defendant acted wilfully in the latter situation, defendant and counsel are unquestionably more culpable in those circumstances than in the former scenario. There is no reason why both situations should be treated the same. Moreover, even when wilfulness cannot be definitively established, circumstances may strongly suggest that defendant or counsel was at least in part motivated by strategic considerations. Here, for example, counsel's culpability was great and strongly suggested manipulation. Counsel waited over a year and one-half after the required date for filing his notice of alibi and until the eve of trial before offering a thin reason for non-compliance. Moreover, Noble gained a significant advantage from the delay, protecting his witness from the type of pre-trial interrogation by police that resulted in two of his other witnesses making damaging pre-trial statements. Thus, even absent a definitive showing of wilfulness, the nature of counsel's conduct was undoubtedly worthy of consideration and should have, at the least, "weighed in the balance."

The Second Circuit rule also ignores other critical considerations bearing on the integrity of the process and the truth-seeking function of the trial, many of which were

specifically cited in *Taylor*. For example, while this Court emphasized in *Taylor* its concern that permitting non-compliance might facilitate the introduction of perjured testimony, the Second Circuit's rule requires no inquiry on this account. Indeed, in this case, various circumstances suggested that the precluded testimony was false, including: the truly eleventh-hour disclosure of the witness, just moments before trial; the Sheriff's inability to uncover Yamagata at the time of the crime, despite the extensive investigation at the bar, suggesting that Yamagata was not in fact present; the highly suspect and apparently false testimony of two other defense witnesses exculpating Noble who had given statements directly implicating Noble at the time of the crime; and the fact that the witness and Noble shared the same place of incarceration and attorney for an extended period of time after Noble was charged in this case but before trial. The Second Circuit's rule does not examine, however, the likelihood that perjured testimony might be admitted, despite this Court's obvious concern over this issue in *Taylor*.

Similarly, under the Second Circuit's rule, the trial court is given no authority, in determining whether to order preclusion, to consider the importance of the precluded witness's testimony in the context of other defense witnesses at trial. In this case, for example, two other witnesses testified that Noble was not one of the three men to accost the victim and one testified to Noble's presence in the bar moments before the incident when the assailants were outside descending the hill to approach the victim. And although the testimony of these witnesses was impeached, so too Yamagata would likely have been impeached by his prior crimes and his jailhouse friendship with the defendant. And his testimony could well have been even further impeached had a timely notice of alibi been filed. Moreover, the Second Circuit rule deprives the trial court of the ability to examine such considerations in ordering preclusion

even though this Court in *Taylor*, in citing *Fendler v. Goldsmith* as an example of a proper method of weighing the relevant factors, specifically noted that that court inquired into "the impact of preclusion on the evidence at trial and the outcome of the case." *Id.* at 415 n.19.

Finally, the Second Circuit's rule fails to accord sufficient discretion to the trial courts, who are in the best position to judge the relevant considerations. In *Taylor*, this Court acknowledged the discretion inherent in requiring a balancing of competing factors, and declined to set down rigid rules that might inappropriately curtail it. This discretion is critical because it is the trial judge, after all, who is the most familiar with such matters as the course of litigation to the point of trial, the practicability of conducting a last-minute investigation into an undisclosed witness, and the extent of the disruption that alternative remedies would require. Yet the Second Circuit rule, and the similar circuit rules limiting preclusion to wilful non-compliance, eliminate the trial court's discretion or severely truncate it. This too cannot be squared with *Taylor* and is harmful to a full and fair determination of the propriety of preclusion.

Thus, the Second Circuit's rule unduly limits the inquiry of the trial courts. It precludes consideration of essential matters, including some specifically identified in *Taylor v. Illinois*, and thwarts a proper consideration of the interests at stake when a defendant fails to follow legitimate state rules requiring reciprocal discovery.

CONCLUSION

Because the Second Circuit's rule contravenes *Taylor v. Illinois* in so many respects and because it is in the center of a deep and irreconcilable split of authority with nationwide implications, this Court should grant review of the Second Circuit's decision.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000
(Argued: September 25, 2000 Decided: April 05, 2001)

Docket No. 00-2154

CASIM NOBLE,

Petitioner-Appellee,

v.

WALTER R. KELLY, Superintendent,

Respondent-Appellant.

Before: CARDAMONE, JACOBS, and SACK, Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York (Sand, J.) granting a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. At petitioner's criminal trial for attempted murder and related offenses in the Supreme Court of the State of New York, Sullivan County, the court precluded alibi testimony because defense counsel failed to comply with a state procedural rule mandating advance notice of intent to call such witnesses. The district court held that the exclusion violated the petitioner's constitutional right to present witnesses in his own defense and violated his right to effective counsel. We affirm. Judge Jacobs

dissents in a separate opinion.

PHILIP L. WEINSTEIN, The Legal Aid Society, Federal Defender Division, Appeals Bureau, New York, NY, for Petitioner-Appellee.

BONNIE M. MITZNER, Assistant District Attorney, Sullivan County, NY (Stephen F. Lungen, District Attorney, and Karen Mannino, Assistant District Attorney, on the brief), for Respondent-Appellant.

Per Curiam:

Casim Noble's petition for a writ of habeas corpus challenges his conviction for attempted murder and related offenses on the ground that his Sixth Amendment Compulsory Process rights were violated when the state trial court ruled that alibi testimony would be excluded because defense counsel failed to comply with a state procedural rule requiring advance notice of intent to call alibi witnesses. Alternatively, Noble argues that his counsel's non-compliance rendered his counsel's services constitutionally ineffective. The United States District Court for the Southern District of New York (Sand, J.) granted Noble's petition for a writ of habeas corpus and directed the Respondent either to release Noble or to retry him. *See Noble v. Kelly*, 89 F. Supp. 2d 443, 464 (S.D.N.Y. 2000).

We affirm the judgment of the district court.

BACKGROUND

Familiarity with the facts of the case and the details of Noble's state criminal trial as set forth in *Noble*, 89 F. Supp.2d at 445-50, is assumed. Noble was convicted in the Supreme Court of the State of New York, Sullivan County, for attempted

murder and various related offenses. Noble's petition for habeas relief challenges the exclusion of testimony that Noble was inside a bar at the time the victim was shot in a car outside. New York Criminal Procedure Law treats an alibi witness as a special type. Section 250.20 provides that the government may serve upon the defense, up to twenty days after arraignment, a demand that the defense identify any witness who intends to testify that "at the time of the commission of the crime charged [the defendant] was at some place or places other than the scene of the crime." N.Y. Crim. Proc. L. § 250.20. The defense has eight days to respond, is under a continuing duty to respond as circumstances and intentions change throughout the trial process, and risks the sanction of exclusion for failure to comply: "If at the trial the defendant calls such an alibi witness without having served the demanded notice . . . the court may exclude any testimony of such witness relating to the alibi defense." *Id.* The court retains discretion to accept the testimony, but if it does, it must grant the government time to prepare a rebuttal. *See* N.Y. Crim. Proc. L. § 250.20 ("The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days."). The prosecution appropriately served an alibi witness request upon Noble's counsel, to which counsel responded that no alibi witnesses were anticipated. At trial and in the habeas proceedings, the prosecution and Noble have disputed whether Steven Yamagata should have been identified as an alibi witness in response to the prosecution's § 250.20 demand. According to the prosecution's evidence at trial, the victim was sitting in a car parked outside the "Around the Corner Bar," and was shot at close range by one of three assailants. The victim and other witnesses identified Noble as the gunman. Following the testimony of the first defense witness, a colloquy ensued in which the prosecution challenged counsel's intention to call Yamagata as a witness, and the court asked what Yamagata would say. Noble's counsel

responded that Yamagata "was inside the bar when he heard the shots, and he was playing pool or some other game in there, and Casim [Noble] was playing [a] video game, and they both exited the bar together." The trial judge asked defense counsel to explain why Yamagata was not an alibi witness whose testimony should have been noticed in advance pursuant to § 250.20. Defense counsel responded that Yamagata was not an alibi witness because the scene of the crime specified in the indictment was the vicinity of the Around the Corner Bar, and that Yamagata's testimony--that Noble was in the bar--would place him at the scene rather than furnish the alibi that he was elsewhere. After taking the matter under advisement, the court adopted the competing view that, in light of the prosecution's pre-trial discovery responses, the scene of the crime for the purpose of alibi analysis, was "in front of the [Around the Corner B]ar." As a sanction for defense counsel's failure to give notice under § 250.20, the court excluded Yamagata's testimony. The jury convicted Noble of attempted murder in the second degree, two counts of criminal use of a firearm in the first degree, and criminal possession of a weapon in the second degree. He was sentenced chiefly to two terms of 12½ to 25 years of imprisonment and one term of 7½ to 15 years of imprisonment, all to run concurrently. On Noble's appeal, the Appellate Division of the New York Supreme Court did not decide whether the preclusion of the alibi testimony was constitutional error, because it held that even if it were, any error introduced thereby was harmless. *See People v. Noble*, 209 A.D.2d 735, 736, 618 N.Y.S.2d 123, 124 (3d Dep't 1994). The court rejected Noble's claim that his counsel was ineffective on the ground that Noble only alleged a "simple disagreement with trial strategies and tactics," and was therefore not sufficient to overturn the convictions. *Id.* Noble's application for leave to appeal to the New York Court of Appeals was summarily denied. *See People v. Noble*, 84 N.Y.2d 1036, 647 N.E.2d 464, 623 N.Y.S.2d 192 (1995). Noble petitioned for a writ of habeas

corpus in 1997. The district court granted the writ on the ground that the trial court's preclusion of Yamagata's testimony violated Noble's compulsory process rights under the Sixth Amendment. *See Noble*, 89 F. Supp. 2d at 454-61. Alternatively, the court held that defense counsel's failure to follow the procedures for calling an alibi witness amounted to constitutionally ineffective counsel. *See id.* at 461-63. We affirm on the first ground and therefore do not reach the second.

DISCUSSION

I. Timeliness

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (codified at 28 U.S.C. § 2244), imposes a time limit for filing habeas petitions. *See* 28 U.S.C. § 2244(d)(1). AEDPA was enacted on April 24, 1996; prisoners whose convictions became final before that date had one year--until April 24, 1997--to file. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998). Noble's conviction became final January 30, 1995, when leave to appeal to the New York Court of Appeals was denied. The district court received his petition on July 22, 1997, after the deadline; but Noble contends that before the time expired he had placed the petition in the hands of the prison authorities for mailing. The Supreme Court held in *Houston v. Lack*, 487 U.S. 266 (1988), that a prisoner appearing pro se satisfies the time limit for filing a notice of appeal if he delivers the notice to prison officials within the time specified. This "prison mailbox" rule is justified by the litigant's dependence on the prison mail system and lack of counsel to assure timely filing with the court. *See id.* at 270-71, 274.

As the district court correctly concluded, this rationale applies with equal force to Noble's circumstances. *See Noble*, 89 F.

Supp. 2d at 450-53. Noble's petition for a writ of habeas corpus was made from jail without the benefit of counsel. As the district court noted, the prison mailbox rule has been extended to a variety of circumstances, including administrative filings, *see Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999) (per curiam), service of discovery responses, *see Faile v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993), motions for reconsideration under Fed. R. Civ. P. 59, *see Smith v. Evans*, 853 F.2d 155, 161 (3d Cir. 1988), and motions for a new trial under Fed. R. Crim. P. 33, *see Marinez v. United States*, No. 89 Cr. 701, 1996 WL 51201, at *2 (S.D.N.Y. Feb. 8, 1996). A number of other circuits have extended the rule to pro se petitions for habeas relief. *See Miles v. Prunty*, 187 F.3d 1104, 1106-07 & n.2 (9th Cir. 1999); *Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999) (en banc); *Jones v. Bertrand*, 171 F.3d 499, 502 (7th Cir. 1999); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n.3 (10th Cir. 1998); *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Moreover, this Court has observed that "[w]hen a prisoner is proceeding pro se . . . federal courts generally consider his or her petition for habeas corpus to have been filed as of the date it was given to prison officials for forwarding to the court clerk." *Adeline v. Stinson*, 206 F.3d 249, 251 n.1 (2d Cir. 2000) (per curiam); *cf. Nelson v. Walker*, 121 F.3d 828, 832 n.2 (2d Cir. 1997) (holding that the date of delivery to prison officials is the relevant date for purposes of determining whether a notice of appeal was filed before the enactment of AEDPA).

We conclude that the district court properly extended the prison mailbox rule to petitions for writs of habeas corpus.

II. Preclusion

A. Standard of Review

Under AEDPA, the federal courts lack power to grant a writ under 28 U.S.C. § 2254 unless the state court ruling on the federal constitutional issue is either "contrary to . . . clearly established Federal law" or "involved an unreasonable application of . . . clearly established Federal law." *See id.* § 2254(d)(1); *see also Williams v. Taylor*, 529 U.S. 362, 412 (2000). We recently held, however, that AEDPA deference is compelled only when the claim has been "adjudicated on the merits" in the state court, and further held that if a state court decides a case without citing to federal law, the "pre-AEDPA standard of review" applies. *See Washington v. Schriver*, 240 F.3d 101, 107-10 (2d Cir. 2001). It is not essential to determine whether AEDPA applies here, as our conclusion is the same under either standard of review.[1]

As for the district court's decision, we review a decision to grant habeas relief de novo. *See Smalls v. Batista*, 191 F.3d 272, 277 (2d Cir. 1999).

B. Constitutionality

We assume, as did the district court, that Yamagata's anticipated testimony qualifies as alibi testimony under § 250.20. The state court ruling on that score is an interpretation of state law that we will not review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68

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[1] The district court's decision, which predates both Williams and Washington, applies the "contrary to" portion of § 2254, holding that the state trial court's failure to inquire into whether defense counsel's behavior was willful amounted to the application of the "wrong standard." *Noble*, 89 F. Supp. 2d at 461.

(1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("Because federal habeas corpus relief does not lie for errors of state law . . . federal habeas review . . . is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation."). The state court's determination that Yamagata was an alibi witness was not arbitrary or capricious. In any case, neither party has challenged this finding on appeal.

The district court held that it was constitutional error to exclude Yamagata's testimony absent a finding that defense counsel's non-compliance with § 250.20 was willful. We agree.[2]

The Sixth Amendment's Compulsory Process Clause, applicable to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment, *see Washington v. Texas*, 388 U.S. 14, 17-19 (1967), provides that "the accused shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const. amend. VI. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the Supreme Court upheld an order excluding the testimony of a defense witness as a sanction for counsel's (i)

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[2]If permitted, Yamagata would have testified that Noble was inside the bar, playing a video game when the shooting occurred. Nothing in the record indicates that Noble could have committed the attempted murder under these circumstances: the witnesses testified that Noble shot the victim from close range, standing just outside the victim's car. This testimony arguably places Yamagata within the definition of an alibi witness. *See Black's Law Dictionary* 72 (7th ed. 1999) (defining "alibi" as "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.").

noncompliance with a discovery rule that required notice of intention to call the witness, and (ii) misleading the court concerning his knowledge of the witness's whereabouts. Although confirming that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *id.* at 408, the Court ruled that courts must balance that right against the State's interest in an orderly trial: "[T]he trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony," *id.* at 411. "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." *Id.* at 412 n.17 (quoting *Williams v. Florida*, 399 U.S. 78, 81 (1970)) (internal quotation marks omitted).

The Court declined to issue comprehensive guidelines for this balancing process, but stated that a trial court should consider "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor," "[t]he integrity of the adversary process," "the interest in the fair and efficient administration of justice," and "the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-15. The Court then held: A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony. *Id.* at 415 (emphasis added). The Court concluded that the conduct of Taylor's counsel amounted to "willful misconduct" for which exclusion is appropriate, "[r]egardless of whether prejudice to the prosecution could have been avoided." *Id.* at 417.

In a pre-*Taylor* case, this Court ruled that alibi testimony is so critical that it cannot be excluded notwithstanding procedural defaults, even where, as here, counsel "offered the court no reasonable explanation" for non-compliance. *Escalera v. Coombe*, 826 F.2d 185, 188 (2d Cir. 1987). Only a "demonstration of substantial prejudice to the prosecution's case" was deemed sufficient to warrant exclusion of alibi testimony. *Id.* at 194.

The Supreme Court vacated this Court's *Escalera* decision and remanded for reconsideration in keeping with *Taylor*. *See Coombe v. Escalera*, 484 U.S. 1054 (1988). This Court, in turn, remanded the matter to the district court for further inquiry consistent with *Taylor*:

[The district court judge] did note in his opinion below that the attorney's "apparent bad faith--or, at least, the absence of a good excuse [wa]s evident" in the failure properly to give notice of his intent to call [an alibi witness]. But this alone is not enough. The absence of a good excuse is not necessarily commensurate with "willful" conduct and it is not readily clear whether Escalera's attorney was, in fact, motivated by a desire to obtain a tactical advantage. *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (per curiam) (quoting *Escalera v. Coombe*, 652 F. Supp. 1316, 1324 (E.D.N.Y. 1987)) (citations omitted).

We agree with the district court that under the circumstances of this case, the state trial court could have used less onerous sanctions (such as an adjournment) to minimize any prejudice to the prosecution, and that a finding of willfulness was therefore required to justify the exclusion of Yamagata's testimony. *See Noble*, 89 F. Supp. 2d at 457 (discussing the prosecution's familiarity with the locale of the alibi and its ability to obtain

impeachment evidence against Yamagata).[3] The state trial court, however, made no finding of willfulness.

After hearing argument, the trial court ruled: This Court will preclude [Yamagata from] giving testimony with respect to the alibi. The record indicates that no notice was served by the defense that they intended to produce an alibi witness. The first that the People were advised of their intention to call this witness was after the close of the People's case yesterday. The record further indicates . . . that the scene of this crime was in front of the Around the Corner Bar. This being the case, the testimony of this witness that the defendant was inside the bar at the time of the shooting is clearly [alibi testimony]. The Court is not satisfied that there is an acceptable reason for not making this application sooner.

We agree with the district court that this ruling does not satisfy the constitutional standard.

C. Remedy

Having concluded that the constitutional standard was not satisfied, the district court conducted its own review of the state

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[3] We therefore need not decide whether, and to what extent, a finding of willfulness is required in every case. *See United States v. Portela*, 167 F.3d 687, 705 & n.16 (1st Cir.), *cert. denied sub nom. Villaman-Rodriguez v. United States*, 528 U.S. 917 (1999). For purposes of the present case, we need only conclude that where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony must be supported by a finding of some degree of willfulness in defense counsel's violation of the applicable discovery rules.

trial record and granted the writ on the basis of its conclusion that the defense attorney's failure to provide a timely notice of alibi was not in fact willful. *See Noble*, 89 F.Supp. 2d at 457. The state argues for the first time on appeal, however, that, if nothing else, the district court should be required to hold an evidentiary hearing to expand the record and consider additional evidence on the question of willfulness. We think that the particular circumstances of this case justify the grant of the writ without such a hearing. The district court's finding that the defense attorney's failure to provide a notice of alibi was a result of "his misinterpretation of the governing discovery rules" and cannot "be attributed to a strategic choice," *Noble*, 89 F. Supp. 2d. at 463, has strong support in the record of the proceedings in the state trial court. First, the colloquy between the trial court and the defense attorney indicates that the attorney thought that Yamagata was not an alibi witness because the indictment identified the scene of the crime as in the "vicinity" of the Around the Corner Bar, which the attorney thought included the area inside the bar. That colloquy also revealed that the attorney thought that the bar's close proximity to the shooting meant that the Yamagata's testimony was not an alibi. If the failure of the lawyer to respond to the alibi witness request was thus simply a mistake, it was of course not willful.

Second, the trial court itself said nothing to suggest that it thought the attorney had acted willfully or in bad faith. The court simply found no "acceptable" reason for the attorney's failure to provide a notice of alibi. *See Escalera*, 852 F.2d at 48 ("The absence of a good excuse is not necessarily commensurate with 'willful' conduct.").

Third, contrary to the state's repeated assertions, *see* Appellant's Br. at 18, 22, 27, 33, 34, 35, Yamagata was not a surprise witness; he was on the defense's pre-trial witness list and his name was mentioned in court in that connection three times.

This is strong evidence against a finding that the non-compliance was willful.

Finally, the state's proffer of what it would prove on remand has little bearing on the issue of willfulness. Although we remanded in Escalera for an evidentiary hearing on willfulness, we did so because we concluded that the record did not "permit[] us to apply the standards enunciated in *Taylor*." 852 F.2d at 48. In this case, however, "in light of the record . . . which includes an explanation by counsel negating the possibility that [his] omission was a strategic choice," we conclude that "[n]o . . . remand is required." *Brown v. United States*, 167 F.3d 109, 110 (2d Cir. 1999).

We also note that the remand in Escalera was particularly appropriate because the district court's decision in that case preceded the Supreme Court's decision in *Taylor* and was therefore ambiguous on the question of willfulness. *See Escalera*, 852 F.2d at 48. In this case, by contrast, Judge Sand was fully aware that his task was to determine whether defense counsel acted willfully, and his findings on that score are clear. *See Noble*, 89 F. Supp. 2d at 457, 462-63. His decision not to hold an evidentiary hearing, when the state not only failed to request such a hearing but opposed the petitioner's attempt to expand the record, was justified by the record and did not constitute an abuse of discretion. *See Nieblas v. Smith*, 204 F.3d 29, 32 (2d Cir. 1999) (a district court has "broad" discretion whether "to hear additional evidence on behalf of the state") (citing cases).

We therefore conclude that a remand is unnecessary.[4]

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[4] Because we conclude that the state trial court committed constitutional error in excluding Yamagata's testimony, we decline to

D. Harmless Error

The Appellate Division concluded that any error introduced by counsel's failure to properly call Yamagata was harmless in light of the otherwise significant evidence against Noble. The district court disagreed, holding that "[w]e are persuaded, after a thorough examination of the record in this case, that the exclusion of Yamagata's testimony did have a substantial and injurious effect in determining the jury's verdict." *Noble*, 89 F. Supp. 2d at 458. Our own review of the record supports the district court's conclusion, for substantially the same reasons that the district court has articulated. [5]

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address the petitioner's alternative claim that he received constitutionally ineffective assistance of counsel.

[5] We note that the pre-AEDPA standard of review discussed in part II.A above does not apply to our harmlessness determination because harmlessness was "adjudicated on the merits" by the Appellate Division. It is well-settled that on direct review, a state appellate court may find a constitutional error harmless only if it is harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Prior to the passage of AEDPA, federal habeas courts reviewing state harmlessness determinations employed a standard less demanding than Chapman, asking whether an error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). After AEDPA, the question arises whether a federal habeas court should continue to apply Brecht or determine instead whether the state court's decision was "contrary to, or involved an unreasonable application of" *Chapman*. 28 U.S.C. § 2254(d)(1); *see, e.g., Maurino v. Johnson*, 210 F.3d 638, 645 (6th Cir.), *cert. denied*, 121 S.Ct. 427 (2000) (adhering to *Brecht*); *Hale v. Gibson*, 227 F.3d 1298, 1325 (10th Cir. 2000) (same); *Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) (expressing skepticism about the vitality of *Brecht*, but declining to

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court. The mandate shall issue forthwith.

JACOBS, Circuit Judge, dissenting:

As to all but one point, I concur in the majority opinion. Thus I agree that Noble's habeas petition was timely (Part I), that it is not necessary to determine whether AEDPA applies (Part II.A), that, under *Taylor v. Illinois*, 484 U.S. 400 (1988), the state court erred in failing to determine whether defense counsel's non-compliance with § 250.20 was willful (Part II.B), and that this failure was not harmless (Part II.D).

I respectfully dissent from Part II.C ("Remedy") only. Rather than affirm the grant of the writ, I would remand to the district court for a hearing to determine whether defense counsel's conduct was willful, because if it was, the exclusion of the testimony was not constitutional error. The majority opinion sees "strong support in the record" for ascribing counsel's non-compliance with § 250.20 to "his misinterpretation of the governing discovery rules," and further posits that "the state's proffer of what it would prove on remand has little bearing on the issue of willfulness." Maj. Op. at [16, 17].

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decide the issue); *Anderson v. Cowan*, 227 F.3d 893, 898 n.3 (7th Cir. 2000) (noting the issue but declining to decide it). The Appellate Division in this case failed to apply *Chapman*, holding that the error was harmless "in view of the overwhelming evidence of guilt." *Noble*, 209 A.D.2d at 735-36, 618 N.Y.S.2d at 124. Because we conclude that the error was not harmless under both possible standards of review, we decline to express a view as to which standard should apply.

I read the record differently. Noble's counsel was an experienced criminal defense lawyer and can be presumed to understand who is an alibi witness. At the same time, counsel had good reason to believe that Yamagata's testimony was of a kind that would be effective only if the government was surprised and lacked an opportunity to prepare for it.

And Noble's counsel had the means to engineer this surprise: Noble's counsel was also counsel to Yamagata, and Yamagata and Noble were friends from prison days. One could find that counsel withheld Yamagata's name until such time as Yamagata could no longer be interviewed by the government (as Yamagata's lawyer, Noble's counsel could see to that), or fully investigated. In any case, I think that the circumstances are sufficiently ambiguous to justify fact-finding. *See Escalera v. Coombe*, 852 F.2d 45, 48-49 (2d Cir. 1988) (remanding habeas petition involving exclusion of alibi witness testimony, holding that "in the absence of other error requiring state court proceedings, it [is] appropriate for the district court to hold its own evidentiary hearing."). *Cf. Taylor v. Illinois*, 484 U.S.400, 412 n.17 (1988) (noting "the ease with which an alibi can be fabricated" (quoting *Williams v. Florida*, 399 U.S. 78, 81 (1970))).

Before a new trial is mandated, we should assure that there has in fact been constitutional error. A remand for fact-finding may avoid unnecessary involvement of the federal judiciary in state criminal proceedings.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CASIM NOBLE,

Petitioner,

- against -

WALTER R. KELLY,

Superintendent, Respondent.

97 Civ. 6907 (LBS)

February 28, 2000, Decided
February 28, 2000, Filed

COUNSEL: For Casim Noble, Petitioner: PHILLIP L. WEINSTEIN, THE LEGAL AID SOCIETY, FEDERAL DEFENDER DIVISION, APPEALS BUREAU, New York, N.Y.

For Walter R. Kelly, Respondent: BONNIE M. MITZNER, STEPHEN F. LUNGEN, DISTRICT ATTORNEY, SULLIVAN COUNTY, Monticello, NY.

HON. LEONARD B. SAND, U.S.D.J.

Casim Noble, a prisoner in state custody, petitions this Court for a writ of habeas corpus. After a thorough examination of the record, we conclude that the Petitioner's conviction was

obtained in violation of his rights to present witnesses in his defense and to the effective assistance of counsel, both of which are guaranteed by the Sixth Amendment. The petition is, therefore, granted.

BACKGROUND

On October 26, 1989, at about 8:00 p.m., Dwight Usher, then 17 years old, was shot four times. Although the shooting was not fatal, the victim suffered severe injuries to his chest, groin, thigh, and elbow. After several operations and a week in the hospital, Usher recovered, though two bullets remain lodged in his body.

The shooting occurred outside a bar, called the Around the Corner Bar, in Kiamesha, New York. The Sullivan County Sheriff's Department conducted an investigation, and on January 24, 1990, a Grand Jury in that county returned a five-count indictment charging three individuals with various crimes in connection with the shooting. (*See* Indictment 38/90.) Those three individuals were the Petitioner, Derrick Pittman, and Rufus Middleton. (*Id.*) Each defendant was charged with attempted murder, first degree assault, and criminal use (two counts) and possession of a firearm. (*Id.*)

A jury trial commenced in New York State Supreme Court in Sullivan County (Kane, J.) on March 14, 1991. The trial centered around the conflicting testimony of four individuals who claimed to have been eyewitnesses to the shooting.[1] Two

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[1] The only physical evidence was presented by Detective Anthony Suarez of the Sullivan County Sheriff's office, who testified that he, along with his partner, Lieutenant Whalen, "recovered four spent cartridges" of 380 caliber from the scene. (*See* Trial Transcript ("Tr.") at 423.) No gun was ever found. (*See id.* at 493.) The

of those witnesses -- Troy Leibert and the victim, Dwight Usher -- testified for the prosecution. The other two witnesses -- Melvin Walker and Raphalena Andrews -- testified for the Petitioner.[2] Because of its centrality to our resolution of this petition, we summarize the eyewitness testimony in some detail.

A. The Eyewitness Testimony

1. Leibert

The first eyewitness to testify was Troy Leibert. Leibert testified that throughout the summer of 1989, he and his cousin, Terence Duncan, had been making regular trips to the Sullivan County area from their homes in New York City. (*See id.* at 115.) Although Leibert denied any use of illegal drugs or involvement in drug trafficking, during cross-examination defense counsel elicited that he had once been convicted for possession of drug paraphernalia. (*See id.* at 186-87.) Leibert testified that on October 26, 1989, he traveled to Sullivan County by bus with

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detective also recovered the victim's coat, which had a bullet hole in it and was covered with blood. (*See id.* at 433-35.)

[2] Because counsel for defendants Pittman and Middleton opposed the calling of both Walker and Andrews, those witnesses technically did not testify for those two defendants. (*See id.* at 586.) In fact, Pittman and Middleton argued that permitting Noble to call those witnesses, over their objection, required a severance. (*See id.* at 563-573, 586). The trial court denied that application (*see id.* at 573), and the Appellate Division affirmed, *see People v. Middleton*, 192 A.D.2d 740, 741, 596 N.Y.S.2d 177, 178 (N.Y. App. Div., 3d Dept. 1993).

Melvin Walker and with Walker's girlfriend, Raphalena Andrews. (*See id.* at 117-18.) Leibert was scheduled to appear in court that day in Sullivan County in connection with a trespassing charge. (*See id.*) When his court appearance was completed, Leibert, along with Walker and Andrews, took a taxicab to the Around the Corner Bar to meet up with Duncan, who they believed was inside. (*See id.* at 120.)

Leibert testified that upon their arrival at the bar, while standing about 30 to 35 feet away (*see id.* at 133), he saw Duncan's car parked outside and noticed that Dwight Usher was seated in the front passenger seat (*see id.* at 123-24).

Leibert then saw "three guys come down" a nearby hill and approach the car. (*Id.* at 124-26.) One of them (later identified as Pittman (*see id.* at 135))[3] knocked on the window, prompting Usher to roll it down. (*See id.* at 126.) Words were exchanged and Usher eventually got out of the car. (*See id.* at 127.) While the argument continued, one of the three (later identified as Noble (*see id.* at 137)) "pulled out a gun and . . . shot" Usher, (*id.*), after which all three ran back up the hill (*see id.* at 145). Leibert, Walker, and Andrews then ran into the bar and told the bartender to call an ambulance. (*See id.* at 148.) Without waiting for the ambulance to arrive, however, Leibert, Walker, and Duncan put Usher in the car and drove him to the Sheriff's Department headquarters. (*See id.* at 150-51.)

2. Usher

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[3] Leibert explained that, as of October 26, 1989, he had seen all three of the defendants before and was able, therefore, to recognize them. He had seen Middleton and Pittman in New York City and recognized Noble, having seen him a few times in the Sullivan County area that summer. (*See id.* at 135-40.)

The second eyewitness to testify was the victim, Dwight Usher. Usher, who also resided in New York City, testified that he began making trips up to Sullivan County in September, 1989 to sell crack cocaine. (*See id.* at 221-24.)

His territory was the Around the Corner Bar. (*See id.*) Usher explained that initially he worked selling crack for a friend, John Clairborn, but that, at some point, he met Terence Duncan. (*See id.* at 229-30.) Because Duncan offered him more money than Clairborn had been paying, Usher switched allegiances and began to sell crack for Duncan. (*Id.*)

Usher testified that on October 26, 1989, at around 7:45 p.m., he saw "a Black male standing on the hill next to the Around the Corner bar . . . ." (*Id.* at 237.) Although he had seen that person a few times and knew that his name was Rufus,[4] he had never met him. (*See id.* at 237-38.) Usher explained that because he had never met Rufus, he "confronted him and asked him why was he up here . . . ." (*Id.* at 237, 240-42.) Rufus responded that it was none of Usher's business and told him "to get out of his face." (*Id.* at 240.) Usher then went back to the bar, asked Duncan for the keys to his car, and waited in the front passenger seat of the car listening to music on the radio. (*See id.* at 242-43, 245.) About two or three minutes later, he saw three males coming down the hill approaching the car (*See id.* at 244.) One of the three, later identified as the defendant Derrick Pittman (*see id.* at 246), asked him to get out of the car (*see id.* at 245). According to Usher, Pittman asked him why he had confronted Middleton (*see id.* at 247), then backed up (*see id.* at 249). "And," Usher concluded, "that's when . . . [Noble]

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[4] Usher subsequently identified that person to be Rufus Middleton. (*See id.* at 239.)

pulled out the gun and shot me." (*Id.*) As Usher fell to the ground, he saw his three assailants run up the hill. (*See id.* at 251.)

Usher also testified that he recalled Leibert, Duncan, and Walker putting him in the car and driving him to the sheriff's office. (*See id.* at 253.) He recalled a conversation with a "female sheriff" who asked him who had shot him. He remembered that he told her that "Casim and Rufus" had shot him. (*Id.* at 253-54.) The sheriff, Corporal Marilyn Cook, testified at the trial and corroborated Usher's account. (*See id.* at 369, 380.)

3. Walker

Melvin Walker, the third eyewitness, was called by the Petitioner. At the time of the trial, Walker was incarcerated on narcotics charges and pursuant to a conviction for attempted rape. On October 26, 1989, however, Walker resided in New York City. That day, he testified, he traveled to Sullivan County by car with Troy Leibert because Troy was scheduled to appear in court. (*See id.* at 600.) Walker testified that he had been inside the Around the Corner Bar that evening prior to the shooting. At one point, he went outside. (*Id.* at 607.) According to Walker, when he left the bar, Leibert, Andrews, Duncan, Noble and Pittman were all inside. (*See id.* at 609, 692.)[5]

Walker testified that, upon exiting the bar, he went across the street to a hotel to make a phone call. (*See id.*) On his way back to the bar a few minutes later, while standing only six or seven feet from Duncan's car, he saw Usher sitting in the car and saw "three people" talking to him. (*Id.*) Usher got out of the car and

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[5] Walker claimed that he did not see Middleton at all that day.

one of the three men shot him. (*See id.*) Walker testified that because it was dark (*id.* at 612) and because Usher's assailants had hoods pulled over their faces (*see id.* at 681), he could not identify them (*id.* at 608-09). However, Walker also testified that he knew Pittman (*see id.* at 646) and Middleton (*see id.* at 647) from New York, and recognized Noble from Sullivan County, and he was certain that those three individuals had not been involved. (*See id.* at 695-96.) Finally, Walker testified that he went to the sheriff's department with Usher, and later visited him at the hospital. At one point, while they were in the hospital, Walker testified that Usher asked him "who did it, who did it," and Walker responded that he didn't know. (*See id.* at 615.)

4. Andrews

The final eyewitness to testify was Walker's former fiancee, Raphalena Andrews. Andrews had not been identified as a witness in advance of trial. The District Attorney told the court that he had tried unsuccessfully to locate Andrews. (*See id.* at 439.) When Andrews testified, she explained that she was appearing in response to a telephone call she had received during the trial from the Petitioner's mother, who asked her to testify. (*See id.* at 762.)

Andrews claimed that, on the night in question, she was standing with Leibert, having just gotten out of a taxicab, when the shooting occurred. (*See id.* at 758.) Like Walker, Andrews testified that she could not see the shooter (*see id.* at 760) because it was dark (*see id.* at 769) and because he and his two companions were wearing hoods that covered their faces (*see id.* at 768).

Moreover, Andrews testified, like Walker, that on the day of the shooting she was familiar enough with Middleton and Noble that she could recognize them and was certain that neither of them

had been involved with the shooting. (*See id.* at 765.)

B. The Alibi and Mistaken Identity Defenses

At trial, Noble and his co-defendants attempted to discredit Leibert's and Usher's testimony. Defense counsel suggested, on cross-examination, that Leibert's account was untrustworthy because of the distance he stood from the shooting (30-35 feet), the lack of lighting (*see id.* at 202), and the fact that the car would seem to have blocked his view of the action (*see id.* at 202-04). Usher's credibility was attacked by the fact that he had confessed to dealing crack, and by the existence of some inconsistencies between his trial testimony and his testimony before the Grand Jury.[6] Noble also tried to discredit Usher by calling Valerie Hoar, a nurse who was working in the emergency room that night, to testify. (*See id.* at 538-39.) Hoar testified that she overheard a conversation between Usher and Lieutenant Whalen (Suarez's partner) in which Whalen asked Usher if he knew who had shot him and Usher said that he did not. (*See id.* at 541.)

In addition to the foregoing challenges to the prosecution's evidence and the testimony of the two witnesses who claimed that Noble and his co-defendants had not been involved, Noble attempted to present two principal defenses at trial. He tried to establish that (1) he had been inside the bar when the shooting

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[6] Usher told the Grand Jury that he went to the bar on the night of the shooting with Liebert and Walker (*see id.* at 310), but testified at trial that he went there with Duncan. In addition, while Usher testified at trial that it was after the confrontation with Middleton that he asked Duncan for his car keys, he had told the Grand Jury that he asked for Duncan's keys prior to the confrontation with Middleton. (*See id.* at 349.)

occurred; and (2) it was three different individuals -- named Cat, Shaka, and Gary -- who confronted and shot Usher and that he and his co-defendants had been mistakenly identified. Several of the witnesses provided circumstantial evidence of the misidentification theory. Usher testified that just prior to the confrontation with Rufus Middleton, he had been involved in a confrontation with Cat, Shaka, and Gary. (*See id.* at 283-84.) During that confrontation, according to Usher, Cat held him in a headlock and broke a gold chain he had been wearing around his neck. (*See id.* at 284, 294, 316-23, 327-29.) Walker also testified that he had witnessed, and even been involved in, the altercation. (*See id.* at 607.) Detective Suarez confirmed, on cross-examination, that he had been involved in drug investigations in the Sullivan County area and that he was familiar with the names Cat, Shaka, and Gary in that context. (*See id.* at 499.) Finally, Corporal Cook's notes, which she took during the initial investigation on the night of the shooting, included a notation which read "Saab 9,000 -- Cat." (*Id.* at 390, 393.)

The principal evidence, however, that Noble hoped to present on both his alibi and mis-identification theories was the testimony of Steven Yamagata. Defense counsel represented to the court that, if called, Yamagata would testify that "he was there that night and he saw the prior fight between Cat, Shaka, and Gary, and that he was inside the bar when he heard the shots . . . and Casim was playing [a] video game, and they both exited the bar together." (*See id.* at 554; *see also* Yamagata Aff.) The prosecution objected to both elements of Yamagata's testimony. With respect to the claim that Yamagata had been in the bar with Noble when the shooting occurred, the District Attorney argued that such testimony should be excluded because it constituted an alibi defense and the Petitioner had

failed to respond to the People's demand for notice of an alibi.[7] (*See* Tr. at 554-56.) After giving Petitioner's counsel an opportunity to research the question and to present any relevant information, and after considering and rejecting an adjournment rather than exclusion, the court sustained the People's objection. (*See id.* at 573-74.) With respect to Yamagata's testimony about

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[7] New York's alibi-notice statute, N.Y. Crim. Proc. L. § 250.20

(McKinney's 1993), provides that:

1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was somewhere other than the scene of the crime, and to call witnesses in support of such a defense, he must, within eight days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely.

. . . .

3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having secured such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

the altercation between Usher and Cat, Gary, and Shaka, the court initially decided to permit Yamagata to testify. (*See id.* at 575.) The court explained that it would not permit testimony from Yamagata as to "the reason for the confrontation" (*id.* at 580), but that because there had been "testimony that one of the individuals involved in this altercation was in fact in the area at the time of the commission of the crime," it would permit "the testimony with respect to the altercation." (*Id.* at 581.) Later, however, after additional argument, the court revised its ruling, reasoning that because Usher had testified about the altercation, the purpose of calling Yamagata to testify about the altercation was only to impeach Usher's testimony. (*See id.* at 593-94.) The court then excluded the testimony on the ground that it was a "collateral issue upon which a third-party witness cannot be called to impeach the testimony of a witness." (*Id.*) Consequently, Yamagata never testified.

C. Procedural History

On March 21, 1991, after a little more than one hour of deliberation, the jury returned guilty verdicts for each defendant on each count of the Indictment.[8] The court entered a judgment of conviction against Noble on May 17, 1991 for attempted murder in the second degree, criminal use of a firearm in the first degree (two counts), and criminal possession of a weapon in the second degree. He was sentenced to a prison term of 12 1/2 to

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[8] Because assault is a lesser included offense, *see* N.Y. Crim. Proc. L. § 1.20(37) (McKinney's 1993), of attempted murder, the jury was instructed not to consider that charge if they found the defendant guilty of attempted murder. (*See* Tr. at 968); N.Y. Crim. Proc. L. § 300.40 (McKinney's 1993).

25 years. (*See* Answer at P 4.) The Appellate Division affirmed the convictions. *See People v. Noble*, 209 A.D.2d 735, 618 N.Y.S.2d 123 (N.Y. App. Div. 1994). With respect to the exclusion of Yamagata's alibi testimony, the court did not address the merits but affirmed on the ground that "even if [it] were to find that [the trial court] committed error when it precluded this testimony, . . . such error would be harmless in view of the overwhelming evidence of guilt." *Id.* at 124. The Appellate Division also concluded that trial counsel's performance satisfied the constitutional standard, noting only that "simple disagreement with trial strategies and tactics does not prove ineffectiveness." *Id.* (citation omitted).

The Court of Appeals denied Petitioner's application for leave to appeal. *See People v. Noble*, 84 N.Y.2d 1036, 623 N.Y.S.2d 192, 647 N.E.2d 464 (N.Y. 1995). Petitioner's application for federal habeas corpus relief was filed with this Court on July 22, 1997. The Court issued an order on September 17, 1997 directing the Petitioner to show cause why his application was not barred by the one-year statute of limitations prescribed by Title I of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, codified at 28 U.S.C. §§ 2244, 2253-55. Noble responded with an affirmation asserting, among other things, that his petition was not time-barred because he delivered it to prison authorities to be mailed on April 22, 1997, within the one-year statute of limitations. Nevertheless, applying the standard that, at that time, governed in this circuit, we dismissed Noble's petition on the ground that his delay in seeking habeas corpus relief was unreasonable. *See Noble v. Kelly*, 1998 U.S. Dist. LEXIS 48, No. 97 Civ. 6907 (LBS), 1998 WL 8992 (S.D.N.Y. Jan. 7, 1998). In *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998), the court altered the standard to be applied by district courts when reviewing the timeliness of habeas corpus petitions involving convictions that predate the enactment of the AEDPA by more

than one year. The Court of Appeals, therefore, vacated our earlier dismissal of Noble's petition and remanded it to be reconsidered in light of its holding in *Ross v. Artuz*. *See Noble v. Kelly*, 1998 U.S. App. LEXIS 38808, No. 98-2255 (2d Cir. Sep. 25, 1998).

On March 3, 1999, Noble filed the amended petition currently before the Court. The petition cites the exclusion of Yamagata's testimony, the failure of his lawyer to obtain the testimony of Lt. Whalen, and statements made to the jury by the prosecutor about drug gangs as the chief errors entitling him to relief. The Respondent's Answer argues that Noble has not exhausted state remedies with respect to some of those claims, and asserts that the exclusion of Yamagata's alibi testimony was harmless because it would have been duplicative of the testimony that Walker was permitted to provide.

After this Court appointed counsel to assist Mr. Noble in the presentation of his petition, counsel provided the court with a letter brief elaborating on the arguments raised in Noble's pro se petition. (*See* Letter from Weinstein to the Court of January 12, 2000.) The Respondent's reply merely re-iterated the contention that Walker gave "the same testimony" that Yamagata would have given. (*See* Letter from Mitzner to the Court of February 8, 2000.) As is set forth in more detail below, that claim is not supported by the record. Walker testified that Noble was in the bar before the shooting occurred; Yamagata would have testified that Noble was in the bar when the shooting occurred.

DISCUSSION

I. PROCEDURAL REQUIREMENTS

A. The Timeliness of the Petition

The AEDPA established a "1-year period of limitation," running from the date a conviction becomes final, for any "application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C.A. § 2244(d)(1) (West 1999). Defendants whose convictions became final more than one year prior to the enactment of the AEDPA had one year from the date of that statute's enactment, or until April 24, 1997, to file an application for habeas corpus relief. *See Ross v. Artuz*, 150 F.3d 97, 102 (2d Cir. 1998). Casim Noble's convictions became final on January 30, 1995 when the New York Court of Appeals denied him leave to appeal. *See People v. Noble*, 84 N.Y.2d 1036, 623 N.Y.S.2d 192, 647 N.E.2d 464 (N.Y. 1995). Accordingly, the AEDPA requires him to have filed his petition on or before April 24, 1997.

As a general rule, a petition for habeas corpus is deemed filed for statute of limitations purposes when it is received by the clerk of the district court. *See* Rule 3, Rules Governing Section 2254 Cases. Because Mr. Noble's petition for habeas corpus was not received by the clerk of the district court until July 22, 1997, it would seem at first glance that his petition is time-barred. A prison inmate proceeding pro se, however, faces "unique" obstacles when attempting to comply with filing deadlines. *Houston v. Lack*, 487 U.S. 266, 270, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988). In particular, the inmate "cannot take the steps other litigants can take to monitor the processing . .." of his filings. *Id.* "Pro se prisoners cannot personally travel to the courthouse to . . ." ensure that their papers are filed, and while other litigants may choose to rely on the postal service, "the pro

se prisoner is forced to do so by his situation." *Id.* at 271.

Recognizing those disadvantages, the Supreme Court has held that a prison inmate proceeding pro se satisfies the 30-day time limit provided by the Federal Rules of Appellate Procedure if he delivers his notice of appeal to prison officials within the thirty-day limit, even if it is not filed with the clerk of the court until after the time limit has expired. *See Houston v. Lack*, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988).[9] One threshold question presented by Mr. Noble's petition is whether a similar "prison mailbox" rule should be applied to an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

In answering that question, we begin by noting that many federal courts have drawn upon the Supreme Court's reasoning in Houston v. Lack, and extended its holding to establish prison mailbox rules for the filing of other types of court papers. *See, e.g., Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999) (FTCA administrative filing); *McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6th Cir. 1997) (motion for extension of time to correct deficiencies in application to proceed in forma pauperis); *Dory v. Ryan*, 999 F.2d 679 (2d Cir. 1993) (civil complaint); *In re Flanagan*, 999 F.2d 753 (3d Cir. 1993) (appeal from bankruptcy court's final order); *Faile v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993) (service of discovery responses); *Lewis v. Richmond City Police Dep't.*, 947 F.2d 733 (4th Cir. 1991) (per curiam) (civil complaint); *Smith v. Evans*, 853 F.2d 155 (3d

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[9] The Federal Rules of Appellate Procedure have codified this holding in Rule 4(c)(1), which provides that an inmate's notice of appeal is timely filed "if it is deposited in the institution's internal mail system on or before the last day for filing." Fed. R. App. P 4(c)(1).

Cir. 1988) (Rule 59 motion for reconsideration); *Marinez v. United States*, 1996 U.S. Dist. LEXIS 1252, No. 89 Cr. 701 (DC), 1996 WL 51201 (S.D.N.Y. Feb. 8, 1996) (Rule 33 motion for new trial); *Cabrera v. United States* 1995 U.S. Dist. LEXIS 11547, No. 94 Civ. 4642 (MGC), 1995 WL 479358 (S.D.N.Y. Aug. 11, 1995) (Rule 33 motion for new trial), *aff'd*, 112 F.3d 503 (2d Cir. 1996).[10] In each of those cases, the court examined the circumstances surrounding the filing deadline at issue and tried to determine whether the concerns expressed by the Supreme Court in *Houston v. Lack* were present.

In this case, then, we must examine whether the Houston Court's concerns are present in the context of an inmate filing an application for habeas corpus relief. In one important sense, they are not. The Court in Houston was primarily concerned with the relative obstacles facing prison inmates as compared to non-incarcerated litigants. *See Houston*, 487 U.S. at 270-71. In § 2254 actions, however, all litigants are prison inmates. In fact, being an inmate is a statutory prerequisite to filing. *See* 28 U.S.C. § 2254(a) (authorizing federal courts to entertain application for a writ of habeas corpus "in behalf of a person in custody"). The drafters of the Rules Governing Section 2254 actions were obviously aware of this fact and may be assumed to have drafted Rule 3's filing requirements with the custodial status of petitioners in mind. A petitioner's custodial status, however, is only one element of the disadvantage recognized by the Court in Houston. The other aspect is the lack of representation by counsel. That disadvantage is not shared by all applicants for a writ of habeas corpus. *See* 28 U.S.C. § 2254(a) (authorizing federal courts to entertain applications for writs of

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[10] *But see Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999) (declining to establish prison mailbox rule for filing of application for state post-conviction remedies).

habeas corpus "in behalf of a person in custody.") (emphasis added). Although Noble is, at this time, represented by counsel (by virtue of this Court's appointment of counsel for this proceeding), when he originally filed his petition he was proceeding pro se. The Houston Court's concerns with the relative disadvantages facing inmates proceeding pro se remains, therefore, a compelling concern in this context.

On at least one occasion, the Supreme Court has rejected the use of a prison mailbox rule. *See Fex v. Michigan*, 507 U.S. 43, 122 L. Ed. 2d 406, 113 S. Ct. 1085 (1993). The Interstate Agreement on Detainers ("IAD") permits inmates in one jurisdiction who are facing prosecution in another jurisdiction to demand resolution of any pending indictment, information, or complaint in that other jurisdiction within 180 days by sending written notice of his incarceration to prosecuting officials. In *Fex v. Michigan*, 507 U.S. 43, 122 L. Ed. 2d 406, 113 S Ct. 1085 (1993), the Court held that this 180-day period runs from the time the prosecuting official receives the notice rather than from the time the inmate delivers his notice to prison officials to be mailed. The Court based its reasoning on a careful exegesis of the IAD's text, which specified that the 180-day period began "after [the inmate] shall have caused [notice] to be delivered . . ." to prosecuting authorities. To the Supreme Court, it was apparent that the "cause to be delivered" language referred to the receipt of the document. Recognizing the Supreme Court's emphasis on interpretation of the statutory text, the Court of Appeals recently explained that the *Fex* opinion signifies that "Houston does not apply . . . when there is a specific statutory regime to the contrary." *Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 n.1 (2d Cir. 1999).

Although the AEDPA appears to be a "specific statutory regime," we do not find that it is contrary to the application of a prison mailbox rule for § 2254 cases. To begin with, the

AEDPA itself is silent with respect to when an application is filed for statute of limitations purposes. The prevailing rule comes from the Rules Governing Section 2254 cases, which predates the enactment of the AEDPA's time limit. Moreover, the specific language used in that rule is quite different from the statutory language that was so persuasive to the Court in *Fex*. The IAD formulated the statute of limitations in terms of "causing to be delivered;" Rule 3 simply states that a petition "shall be filed with the clerk of the district court." Rule 3's formulation, moreover, is virtually identical to the language at issue in Houston itself. *See* Fed. R. App. P. 4(a)(1) ("the notice of appeal . . . must be filed with the district clerk . . ."). We understand, of course, that the purpose of the AEDPA was generally to expedite the filing of habeas corpus petitions, but we are unble to conclude that Congress did so by silently amending Rule 3 of the Rules Governing Section 2254 Cases to prohibit the operation of a prison mailbox rule.

We conclude, therefore, that the prison mailbox rule should apply to petitions filed by pro se inmates seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. *Accord Jones v. Bertrand*, 171 F.3d 499, 502 (7th Cir. 1999); *Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999); *Nichols v. Bowersox*, 172 F.3d 1068, 1073-77 (8th Cir. 1999) (en banc); *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n.3 (6th Cir. 1997); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *Torres v. Irvin*, 33 F. Supp. 2d 257, 270 (S.D.N.Y. 1998); *Hoyer v. Senkowski*, 1998 U.S. Dist. LEXIS 22772, No. 97 Civ. 674, 1998 WL 357339 (N.D.N.Y. May 22, 1998). Mr. Noble's application will therefore be considered timely if it can be shown that he delivered it to prison authorities on or before April 24, 1997.

The question of which party bears the burden of proof on this

question remains open in this circuit. *See Covington v. DiBiase*, 1999 U.S. App. LEXIS 1397, *2, n.1, No. 97 2650, 1999 WL 48775, at *1 n.1 (2d Cir. Jan. 29, 1999).[11] We need not reach that question in this case, however, because Petitioner has provided sufficient evidence that he submitted his application to prison authorities on April 22, 1997, and the Respondent has not challenged that fact. In an affirmation filed with the Court, Mr. Noble indicates that his application for habeas corpus "was placed in the hands of the company C.O. for signature by the Hall Captain and transfer to Facility Business Office on April 22, 1997." (Pet. Aff. at 3.)[12] The affirmation also states that the "disbursement form" confirms this date, *id.*, and the copy of the disbursement form that was attached reflects that Noble submitted it on April 22, 1997. In addition, the Court notes that the original petition was signed by Mr. Noble on January 15, 1997, and finds that this fact corroborates Mr. Noble's contention that it was delivered to prison authorities prior to April 24, 1997. *See Torres v. Irvin*, 33 F. Supp. 2d 257, 270 (S.D.N.Y. 1998) ("Absent evidence to the contrary, the Court assumes that Torres gave his petition to prison official for mailing on the date he signed it . . . .") (citing *Hunter v. Kuhlman*, 1998 U.S. Dist. LEXIS 5378, *4 n.2, 97 Civ. 4692, 1998 WL 182441, at *1 n.2 (S.D.N.Y. April 17, 1998); *Hughes*

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[11] For an extended analysis of the burden of proof issue in this context, *see Thomas v. Gish*, 64 F.3d 323, 324-25 (7th Cir. 1995).

[12] *See Robinson v. P.O. Nicole Matos et al.*, 1999 U.S. Dist. LEXIS 5447, No. 97 Civ. 7144(TPG), 1999 WL 225938, at *3 (S.D.N.Y. April 19, 1999) (finding that complaint was filed when delivered to prison authorities when only evidence was plaintiff's own statement).

v. Irvin, 967 F. Supp. 775, 778 (E.D.N.Y. 1997); *Jones v. Artuz*, 1997 U.S. Dist. LEXIS 15581, No. CV 97-2394, 1997 WL 876735, at *1 (E.D.N.Y. Sept. 13, 1997)); *Cabrera v. United States*, 1995 U.S. Dist. LEXIS 11547, *3 n.1, No. 94 Civ. 4642, 1995 WL 479358, at *1 n.1 (S.D.N.Y. Aug. 11, 1995). For these reasons, the Court finds that Mr. Noble submitted his application to prison authorities to be mailed on April 22, 1997. It is, therefore, timely.

B. The Exhaustion Requirement

A federal court may not grant habeas corpus relief to a person in custody pursuant to a judgment of a State court unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). This requirement, which is grounded in principles of "federalism, comity, and udicial economy," *Murray v. Carrier*, 477 U.S. 478, 488-89, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986), requires a petitioner to raise all of his claims in the highest state court available prior to presenting them to a federal court as part of a petition for a writ of habeas corpus. *See Tyson v. Keane*, 159 F.3d 732, 735 (2d Cir. 1998), *cert. denied sub. nom. Tyson v. Greiner*, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

Although Respondent disputes exhaustion (*see* Answer at P 15), he does not explain his reasoning. In any event, it is apparent from the Appellate Division's opinion affirming the conviction that the claims presented in Noble's amended petition are virtually identical to the claims presented to the state court, including the claims presented in Noble's supplemental brief to the Appellate Division. *See Daye v. Attorney General*, 696 F.2d 186, 192 (2d Cir. 1982) (en banc) (holding that claims are exhausted when substance of petitioner's claims on direct appeal is same as substance in petition, even if phrased differently).

Because the Court of Appeals denied Mr. Noble leave to appeal the Appellate Division's ruling, his claim reached the highest state court for exhaustion purposes. *See Williams v. Smith*, 591 F.2d 169, 171 (2d Cir. 1979) (holding that state remedies were exhausted after decision by the Appellate Division and denial of leave to appeal by the Court of Appeals); *Ramirez v. Headley*, 1998 U.S. Dist. LEXIS 17744, 98 Civ. 2603 (RWS), 1998 WL 788782, at *4 (S.D.N.Y. Nov. 10, 1998). The Court finds, therefore, that Mr. Noble has exhausted state remedies with respect to all of his claims.

II. EXCLUSION OF ALIBI TESTIMONY

A. Legal Standard

The Sixth Amendment to the Federal Constitution guarantees every criminal defendant "the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI. Although some have suggested that the Compulsory Process Clause only guarantees the power to subpoena witnesses, *see Taylor v. Illinois*, 484 U.S. 400, 407-08 nn. 10-12, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1987), the Supreme Court of the United States has consistently held that such a right would be meaningless unless it were also interpreted as a right to present those witnesses at trial. *See Michigan v. Lucas*, 500 U.S. 145, 149, 114 L. Ed. 2d 205, 111 S. Ct. 1743 (1991); *Taylor*, 484 U.S. at 407-08 ("Our cases establish at a minimum, that criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt.") (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987)). The right to present exculpatory testimony is central to the concept of an adversary system, *see Taylor*, 484 U.S. at 408-09 (citing *United States v. Nixon*, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)), and is "a fundamental element of due process of law," 484 U.S. at

409 (*citing Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)). *See also Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense").

Of course, the accused's right to present witnesses in his defense is not without limits. For example, a court may limit the presentation of evidence if it is concerned about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S.Ct. 1431 (1986). Similarly, it is consistent with the Compulsory Process Clause for the states to enact discovery or evidentiary rules that limit a defendant's opportunities to prevent favorable testimony. *See Lucas*, 500 U.S. at 149-151 (rape shield statute); *Rock v. Arkansas*, 483 U.S. 44, 55-56, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) (*citing Chambers*, 410 U.S. at 295).

Alibi-notice statutes, such as the one at issue here, have been reviewed by the Court on two occasions and found to be constitutional each time. *See Wardius v. Oregon*, 412 U.S. 470, 474, 37 L. Ed. 2d 82, 93 S. Ct. 2208 (1973) (describing a similar statute as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system"); *Williams v. Florida*, 399 U.S. 78, 90, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970) (an alibi-notice statute "by itself in no way affected [the defendant's] crucial decision to call alibi witnesses. . . . At most, the rule only compelled the defendant to accelerate the timing of his disclosure . . . .").

In *Taylor v. Illinois*, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1987), the Supreme Court addressed the constitutionality of excluding exculpatory evidence as a sanction for violating a

discovery rule, by articulating a balance between the state's need to control the evidence presented at trial and an accused's right to present a defense. The Court premised its reasoning on the proposition that the essential purpose of the Compulsory Process Clause is to ensure that judgments are not "founded on a partial or speculative presentation of the facts." *Id.* at 411 (quoting *Nixon*, 418 U.S. at 709). As the court explained, however, that principle . . . is also the source of essential limitations on the right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witness' testimony. 484 U.S. at 410-11. Discovery procedures, like an alibi-notice statute, "minimize[] the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." *Id.* at 411-12; *see also id.* at 412 (noting state's need to protect itself from "an eleventh-hour defense").

Trial courts, therefore, should administer and enforce those discovery procedures in light of the principle that the ultimate goal of the adversary process is to provide the triers of fact with evidence that is as thorough and complete as possible. "A trial judge," therefore, "may . . . insist on an explanation for a party's failure to comply with . . ." a discovery rule. *See id.* at 415.

If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process clause simply to exclude the witness' testimony.

Id. (citing *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975)). A defendant may not invoke the Compulsory Process Clause in a manner that undermines the effectiveness of the adversary system as a means of discovering the truth. But if no such reason is found, then the extreme sanction of exclusion may be inappropriate and an alternative sanction should be considered. *See* 484 U.S. at 413-14.

In *Escalera v. Coombe*, 826 F.2d 185 (2d Cir. 1987), which was decided before *Taylor*, the court reversed a denial of a petition for habeas corpus on the ground that, in the particular circumstances of that case, it was unconstitutional for the state trial court to preclude the testimony of a proffered alibi witness because of counsel's failure to file notice of an alibi. The court noted that "Escalera's counsel offered the court no reasonable explanation for [his] failure" to comply with the statute, *id.* at 188, but nevertheless found that the tremendous importance of the proffered alibi outweighed that concern. *See id.* at 191-92. "There simply is nothing more material to Escalera's guilt or innocence than evidence of his whereabouts during the thirty minutes immediately preceding the crime." *Id.* Applying the balancing test which then prevailed, *see Ronson v. Comm'r of Correction of New York*, 604 F.2d 176, 178-79 (2d Cir. 1979) (applying balancing test in context of notice of insanity defense statute); *cf. Walker v. Hood*, 679 F. Supp. 372, 380-81 (S.D.N.Y. 1988),[13] the court concluded that "preclusion of an important defense witness solely as a sanction for failure to comply with New York's alibi notice statute was constitutionally impermissible absent a demonstration of substantial prejudice to the prosecution's case." 826 F.2d at 194.

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[13] *See also Alicea v. Gagnon*, 675 F.2d 913, 917-925 (7th Cir. 1981) (analyzing permissibility of exclusion of defendant's alibi testimony pursuant to Wisconsin's alibi-notice statute).

Upon the state's petition for a writ of certiorari, the Supreme Court vacated *Escalera* and remanded for reconsideration in light of its intervening decision in *Taylor*. *See Coombe v. Escalera*, 484 U.S. 1054, 98 L. Ed. 2d 971, 108 S. Ct. 1004 (1988); *Escalera v. Coombe*, 852 F.2d 45, 45 (2d Cir. 1988) (per curiam). On remand, the court, applying *Taylor*, focused on whether defense counsel's failure to file an alibi notice occurred in circumstances that might frustrate the integrity of the adversary process. The court noted that although the district court had referred to defense counsel's "apparent bad faith -- or, at least, the absence of a good excuse," that finding was an insufficient basis for preclusion. *Escalera*, 852 F.2d at 48 (citing *Escalera v. Coombe*, 652 F. Supp. 1316, 1324 (E.D.N.Y. 1987)). "The absence of a good excuse," the court reasoned, "is not necessarily commensurate with 'willful' conduct and it is not readily clear whether Escalera's attorney was, in fact, motivated by a desire to obtain a tactical advantage." *Id.* Therefore, the court remanded the case to the district court for an evidentiary hearing "as to whether or not the failure of Escalera's counsel to list . . . a potential alibi witness meets the standards enunciated in *Taylor* . . . ." *Id; see also United States v. Levy-Cordero*, 67 F.3d 1002, 1015 (1st Cir. 1995) (remanding to district court for evidentiary hearing as to whether defense counsel's failure to comply with federal alibi notice requirements was willful); *Poo v. Hood*, 1991 U.S. Dist. LEXIS 4861, No. 89 Civ. 7574 (MBM), 1991 WL 60389, at *2 (S.D.N.Y. April 12, 1991) (ordering evidentiary hearing to determine whether defense counsel's failure to comply with New York's alibi-notice statute was willful, as articulated in *Taylor*).[14]

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[14] After an evidentiary hearing, the court concluded that preclusion was inappropriate because defense counsel's failure was not willful. *See Poo v. Hood*, 1992 U.S. Dist. LEXIS 1535, No. 89 Civ. 7874, 1992 WL 30617, at *4 (S.D.N.Y. Feb. 12, 1992). Nevertheless, the court concluded that the error was harmless in light of the

B. Application to Yamagata's Testimony

When defense counsel offered to call Mr. Yamagata during trial, and proffered that Yamagata would testify that he was inside the bar with Noble when the shooting occurred, the trial court, appropriately, inquired as to the reason that defense counsel had failed to provide notice of an alibi defense. Noble's counsel responded that he did not file an alibi notice because he did not believe that the testimony being offered constituted an alibi. He argued that, for purposes of compliance with the alibi notice statute, the Indictment defined the scene of the crime and that the Indictment in this case alleged crimes occurring "in the vicinity of the Around the Corner Bar," which would, presumably, include the bar's interior. (*See* Tr. at 555.) Defense counsel also maintained that Yamagata's testimony would not constitute an alibi because, even if the crime scene was the front of the bar, the proffered testimony only placed the defendant a short distance away. (*See id.* at 554.)

The trial court rejected both of defense counsel's arguments. The court noted that the District Attorney had served Noble's counsel with an alibi demand on April 16, 1990 -- almost a full year prior to the commencement of the trial. The demand called for a response if the defendant intended "to offer a trial defense that at the time of the commission of the crime(s) charged you were at some place or places other than the scene of the crime . . . ." (Alibi Demand) A discovery response provided by the prosecution on the very same day identified the "place . . . of the alleged occurrence" to be the area "in front of the Around the Corner Bar . . . ." (Response to Court's 20 Day Order at P 1.)

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negligible "potency" of the excluded testimony and therefore denied relief. *Id.* at *5.

According to the court, it was this discovery response rather than the Indictment that defined the scene of the crime for purposes of applying the alibi notice statute. (*See* Tr. at 574.) Moreover, the court rejected defense counsel's other argument -- that the term "alibi" is limited to those defenses placing the defendant far from the crime scene -- reasoning that an alibi correctly describes any defense in which the defendant is anywhere other than the crime scene, even someplace quite nearby. (*See id.)*

We are not concerned here with whether those two rulings were correct; they are matters of state law and would not, even if erroneous, permit this Court to grant habeas corpus relief. *See Lewis v. Jeffers*, 497 U.S. 764, 765, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990) ("Federal habeas corpus does not lie for errors of state law."). Our inquiry relates to whether preclusion of Yamagata's testimony was an appropriate sanction for counsel's failure to file a notice of an alibi defense, assuming that he was, in fact, required to do so, or was violative of Petitioner's Sixth Amendment rights. Our review of the record discloses that the court excluded Yamagata's testimony without ever finding that counsel's failure to file the requisite notice was willful or otherwise motivated by a desire for tactical advantage. The court stated that it did not find an "acceptable reason" (*see* Tr. at 574), but, as the Second Circuit has observed, "the absence of a good excuse is not necessarily commensurate with 'willful' conduct . . . ." *Escalera*, 852 F.2d at 48. Far from being willful or tactical, defense counsel's failure to file the notice appears to have been motivated by a genuine, albeit apparently erroneous, belief that Yamagata's testimony was not an alibi. The record reveals no inquiry as to whether defense counsel's position was taken in bad faith, nor does it did close any reason that the trial court might have so believed. We are mindful, of course, that the Supreme Court did not intend for *Taylor*'s focus on willful violation of discovery procedures to serve as an exclusive test

as to the conditions under which preclusion is appropriate. *See Taylor*, 414 ("It is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case."). But where, as is the case here, the record discloses no indication that the trial court ever considered whether defense counsel's failure to comply with the notice requirement was designed to frustrate the truth-seeking function of the trial, we conclude that the court's exclusion of the alibi evidence violated the defendant's rights under the Compulsory Process Clause.

Our conclusion is reinforced by the minimal degree of prejudice that an alternative sanction would have caused the prosecution. In the course of the investigation that followed immediately after the shooting, the sheriff's department secured the bar and interviewed many of the patrons who had been inside. (*See* Tr. at 407-08.) Unlike the typical alibi defense, therefore, in which the defendant claims to have been at some distant, unknown locale, the prosecution in this case had a wealth of evidence about the place where the defendant claimed to have been and about the other witnesses who might contradict that testimony. Moreover, Yamagata was in custody at the time he was proffered as a witness. The prosecution surely possessed information about him, therefore, which it might have used to impeach his testimony. Finally, it should be noted that Yamagata was proffered as a witness after theclose of the prosecution's case; no prosecution witnesses would have been inconvenienced by a brief delay. Had the trial court permitted Mr. Yamagata to testify, but granted the prosecution additional time to prepare a cross-examination or to adduce rebuttal testimony, the record from which the jury would be asked to render a verdict would have been more complete and accurate, not less. In such circumstances, we conclude that the trial court's decision to exclude the testimony, in the absence of any finding of bad faith or willful misconduct, violated Noble's rights

under the Compulsory Process Clause of the Sixth Amendment. *Cf. State v. Harris*, 132 Idaho 843, 979 P.2d 1201, 1205 (Idaho 1999) (applying *Taylor*, and concluding that exclusion of exculpatory testimony to be unconstitutional when court never inquired into prejudice caused to prosecution).

C. Harmless Error

Although it was the principal issue raised on direct appeal, the Appellate Division did not reach the question of whether the trial court correctly applied state or federal law in precluing Mr. Yamagata's testimony. The court reasoned that "even if [it] were to find that [the trial court] committed error when it precluded this testimony . . . such error would be harmless in view of the overwhelming evidence of guilt." *People v. Noble*, 209 A.D.2d 735, 618 N.Y.S.2d 123, 124 (N.Y. App. Div. 1994) (citations omitted). In so ruling, the court seems to have applied New York's harmless error standard for non-constitutional errors. *See People v. Crimmins*, 36 N.Y.2d 230, 326 N.E.2d 787, 791-94, 367 N.Y.S.2d 213 (N.Y. 1975). Although "verbalization" of that standard as it has been applied over the years "cannot be nicely harmonized," 326 N.E.2d at 792, one of its distinguishing characteristics is that it permits a reviewing court to find an error harmless if it finds "overwhelming proof of the defendant's guilt," 326 N.E.2d at 793-94.

By contrast, when a state court reviews a conviction on direct appeal in which a federal constitutional error is established, the court must "be able to declare a belief that [the trial court's error was] harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), in order to find the error harmless. The *Chapman* standard provides that an "error is not harmless . . . if 'there is a reasonable possibility that the . . . [error] might have contributed to the conviction,'" no matter how "overwhelming may be the

quantum and nature of other proof." *Crimmins*, 326 N.E.2d at 794 (citing *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 86, 11 L. Ed. 2d 171, 84 S. Ct. 229 (1963)). Because the Appellate Division failed to consider the causal effect of Yamagata's exclusion on the jury's verdict, focusing instead on its assessment that the evidence of guilt was overwhelming, it clearly applied an incorrect standard. We are not bound, therefore, by the Appellate Division's conclusion that any error that occurred here was harmless.

Nevertheless, to grant habeas corpus relief, this Court must also decide whether the trial court's error and the Appelate Division's affirmance thereof were harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993). But because this case comes to us on collateral review, rather than direct review, we do not apply the *Chapman* harmless error standard even though the error is constitutional in nature. *See id.* at 638.[15] To find the error harmless, for habeas purposes, we must determine that it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)); *see also Kotteakos*, 328 U.S. at 764-65 ("If . . . the [court's] conviction is sure that the error did not influence the jury, or had but slight

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[15] Because the exclusion of Yamagata occurred "during the presentation of the case to the jury" and "may . . . be quantitatively assessed in the context of other evidence presented . . .," it is a "trial error" subject to harmless error review rather than a structural error requiring immediate reversal. *Brecht*, 507 U.S. at 629-30; *see Wray v. Johnson*, 202 F.3d 515, 525, 2000 U.S. App. LEXIS 1248, *25 (2d Cir. 2000).

effect, the verdict and judgment should stand. . . . . But if one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error," then it is harmful.) If, when all is said and done, we are in grave doubt as to whether or not the exclusion of Yamagata's testimony had such an effect, we must find the error harmful and grant relief. *See O'Neal v. McAninch*, 513 U.S. 432, 440, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995).

We are persuaded, from a thorough examination of the record in this case, that the exclusion of Yamagata's testimony did have a substantial and injurious effect in determining the jury's verdict. The Respondent claims that the exclusion of Yamagata's alibi testimony was harmless because Melvin Walker offered the same testimony. However, as the trial court itself noted during trial (*see* Tr. at 611), Melvin Walker testified that Mr. Noble was inside the bar before the shooting occurred, but never testified that Mr. Noble was in the bar when the shooting occurred. (*See id.* at 607-09, 693.)

We note as well that the District Attorney successfully impeached Walker's testimony on cross-examination by revealing that Walker had previously identified Noble as the shooter. *Id.* at 711.[16] The only other defense witness who

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[16] The District Attorney also demonstrated that Walker's testimony was inconsistent with the little physical evidence that was available. For example, Walker testified that the windows of Duncan's car were tinted (*see id.* at 663), which was, apparently contradicted by Detective Suarez's testimony and by the photographs of the car that were admitted into evidence (*see id.* at 689-90). Also, Walker told the sheriff's department that he had never been to the Around the Corner Bar prior to the night of Usher's shooting *(see id.* at 631) and that he came up with Leibert and Andrews on a bus (*see id.* at 704) rather than by car, both of which contradicted his trial

claimed that Noble had not been the shooter, Andrews, was similarly impeached by the fact that she had made a statement on the night of the shooting identifying Noble as the shooter. Although both Andrews and Walker had explanations for that crucial inconsistency,[17] Yamagata's testimony, as far as the record discloses, could not have been similarly discredited.

Walker's testimony does not, therefore, render the exclusion of Yamagata's alibi testimony harmless. Petitioner's trial focused, almost exclusively, on conflicting identification testimony; we cannot conclude, as we must to find the error harmless, that Yamagata's exclusion did not have a substantial and injurious effect on the jury's verdict. Particularly in light of the inconsistencies and other problems with Liebert's and Usher's

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testimony. Finally, the District Attorney also discredited Walker by suggesting a possible bias due to the fact that the same District Attorney was responsible for prosecuting Walker.

[17] Walker claimed that (1) the statement was typed by someone else and did not accurately reflect what he told the officers (*see id.* at 698-99, 748-49, 753-54); (2) that when he made the statement he was tired and wanted to leave and therefore told the officers what they wanted to hear (*see id.* at 750), and (3) that he intentionally implicated Noble in the shooting because he was in competition with Noble for drug sales and wanted to put Noble out of business (*see id.* at 747). The only explanation Andrews offered for her prior inconsistent statement was that before speaking to the sheriff she had spoken to Leibert and some of his friends (*see id.* at 795), and that "everybody else was saying it too" (*id.* at 786).

testimony and the total lack of any physical evidence,[18] a potential alibi might very well have altered the outcome of the trial. The exclusion of that witness was not harmless.

D. Standard for Granting Habeas Corpus Relief

When the claims presented in an application for habeas corpus relief have been fully presented to the highest state court, a federal court may only grant the application if the State court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1) (West 1999). Interpretation of that convoluted language has engendered a pronounced split among the federal circuit courts, *see Leka v. Portuondo*, 76 F. Supp. 2d 258, 268 n.21 (E.D.N.Y. 1999) (summarizing in detail the positions of the different circuits), as to which the Second Circuit has, to date, remained silent, *see Smalls v. Batista*, 191 F.3d 272, 278 n.5 (1999).[19]

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[18] The 380 cartridges and bloody, bullet-ridden coat are physical evidence that Usher was shot, but do not, in any way, link Noble or his co-defendants to the crime.

[19] The Supreme Court heard oral argument on this question on October 4, 1999 in *Williams v. Taylor*, 120 S. Ct. 299, 145 L. Ed. 2d 29. For a transcript of the argument, *see Williams v. Taylor*, 120 S. Ct. 299, 145 L. Ed. 2d 29, WL 813784 (Oct. 4, 1999). In light of the protracted nature of these proceedings, and our concern that the Petitioner may be detained improperly, we do not believe it would be appropriate to defer further resolution of this petition pending a decision in that case. Moreover, for the reasons set forth below, we do not anticipate that the Court's decision in *Williams v. Taylor* will

According to one view, first advanced in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997), the words "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" state the relevant standard only when a claim involves a pure question of law. *See id.* at 870; *Neelley v. Nagle*, 138 F.3d 917, 923-24 (1998). When the claim involves a mixed question of law and fact, however, the federal court acts pursuant to the clause referring to an "unreasonable application of. . .clearly established Federal law," and exercises more deferential review. *See Neelley*, 138 F.3d at 924; *Drinkard v. Johnson*, 97 F.3d 751, 769 (1996); *Lindh*, 96 F.3d at 870.[20] Another approach, originating with

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affect the resolution of this case.

[20] This approach has been followed in the following cases: *Neelley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998), *cert. denied*, 525 U.S. 1075, 119 S. Ct. 811, 142 L. Ed. 2d 671 (1999); *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir.), *cert. denied*, 522 U.S. 819, 139 L. Ed. 2d 32, 118 S. Ct. 72 (1997); *Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107, 137 L. Ed. 2d 315, 117 S. Ct. 1114 (1997); *Glover v. Portuondo*, 1999 U.S. Dist. LEXIS 7986, 96 Civ. 7616(JGK), 1999 WL 349936 (S.D.N.Y. May 28, 1999); *Millan v. Keane*, 1999 U.S. Dist. LEXIS 3884, 97 Civ. 3874(JGK), 1999 WL 178790 (S.D.N.Y. Mar. 31, 1999); *Montalvo v. Portuondo*, 1998 U.S. Dist. LEXIS 19137, 97 Civ. 3336(RWS), 1998 WL 851589 (S.D.N.Y. Dec. 9, 1998); *Natal v. Bennett*, 1998 U.S. Dist. LEXIS 18868, 98 Civ. 1872(RWS), 1998 WL 841480 (S.D.N.Y. Dec. 3, 1998); *Carromero v. Strack*, 1998 U.S. Dist. LEXIS 18906, 98 Civ. 3519(LAP), 1998 WL 849321 (S.D.N.Y. Nov. 19, 1998); *Rodriguez v. Bennett*, 1998 U.S. Dist. LEXIS 17274, 98 Civ. 580(LBS), 1998 WL 765180 (S.D.N.Y. Nov. 2, 1998); *Redd v. Quinones*, 1998 U.S. Dist. LEXIS 15753, 98 Civ.

O'Brien v. DuBois, 145 F.3d 16, 24 (1st Cir. 1998), focuses on the portion of § 2254(d) that refers to Federal law "as determined by the Supreme Court of the United States." A federal court following this approach must review state court decisions and determine, first, whether the Supreme Court has prescribed a "governing rule," which exists if a Supreme Court decision "by virtue of its factual similarity . . . or its distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations can fairly be said to require a particular result in a particular case." *O'Brien*, 145 F.3d at 25. If so, then the court reviews the state court decision using the "contrary to" clause, whether the question is a pure question of law or a mixed question, and grants relief if the state court reached a different result than that required by the Supreme Court's governing rule. If not, then the habeas court applies the "unreasonable application clause," in which case the state court decision "must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *O'Brien*, 145 F.3d at 25; *see also Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 891 (1999) ("whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot

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2604(LBS), 1998 WL 702334 (S.D.N.Y. Oct. 7, 1998); *Fernandez v. Dufrain*, 11 F. Supp. 2d 407 (S.D.N.Y. 1998); *Morgan v. Bennett*, 1998 U.S. Dist. LEXIS 8652, 96 Civ. 4106(ERK), 1998 WL 315135 (E.D.N.Y. May 27, 1998); *Ramirez v. Senkowski*, 7 F. Supp. 2d 180 (E.D.N.Y. 1998); *Smalls v. Batista*, 6 F. Supp. 2d 211 (S.D.N.Y. 1998); *Smith v. Sullivan*, 1 F. Supp. 2d 206 (W.D.N.Y. 1998); *Mobley v. Stinson*, 1997 U.S. Dist. LEXIS 1885, 94 Civ. 5911(HB), 1997 WL 80587 (S.D.N.Y. Feb. 26, 1997).

reasonably be justified").[21] Finally, the third approach, articulated in *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998), *cert. granted*, 526 U.S. 1050, 119 S. Ct. 1355, 143 L. Ed. 2d 516 (1999), combines elements of both and provides that "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* at 865 (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1988)) (internal quotation marks omitted).

It is our view that the trial court's decision to exclude Yamagata's alibi testimony was erroneous, *see supra* Part II(B), and harmful, *see supra* Part II(C). To grant relief, however, we must determine whether that error was "contrary to" or "an unreasonable application of" clearly established federal constitutional law, as those terms have been construed by the various circuit courts. We believe that under any interpretation of those terms, the deprivation that occurred here entitles the Petitioner to a writ of habeas corpus.

The trial court's error, and the Appellate Division's erroneous affirmance thereof, involve pure questions of law. The trial court did not consider whether defense counsel had wilfully or in bad faith failed to comply with the alibi notice requirement; it merely

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[21] The O'Brien approach has also been adopted, with a slight modification, in *Matteo v. Superintendent*, 171 F.3d 877, 891 (3d Cir. 1999), *cert. denied*, U.S. , 145 L. Ed. 2d 62, 120 S. Ct. 73 (1999). It has also been applied in *Lurie v. Wittner*, 75 F. Supp. 2d 117 (S.D.N.Y. 1999); *Chance v. Kupec*, 1998 U.S. Dist. LEXIS 18997, 96 Civ. 2204(AHN), 1998 WL 846740 (D. Conn. Nov. 18, 1998); *Bragdon v. Warden*, 1998 U.S. Dist. LEXIS 18998, 96 Civ. 1840(AHN), 1998 WL 846738 (D. Conn. Nov. 18, 1998).

stated that there was no "acceptable reason" and, on that basis, excluded the testimony. The court's error, therefore, does not lie in its application of the *Taylor* standard to the particular facts of this case; it lies in the fact that the court applied the wrong standard. Similarly, the Appellate Division affirmed that error while applying the wrong harmless error standard. The Lindh approach, therefore, requires us to apply the "contrary to" clause of § 2254(d). Moreover, both the trial court's and the Appellate Division's decisions were erroneous because they deviated from directly controlling decisions of the United States Supreme Court. The trial court's ruling was contrary to *Taylor*; the Appellate Division's was contrary to *Chapman*. The O'Brien approach as well, therefore, would require us to apply the "contrary to" clause. Because, for the reasons already stated, we are convinced that the exclusion of Yamagata's testimony was contrary to clearly established Federal law, Noble's petition is granted on the ground that his conviction was obtained in violation of the Compulsory Process Clause.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A claim that one has been deprived of the effective assistance of counsel, on the other hand, involves a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) (citation omitted); *Ventura v. Meachum*, 957 F.2d 1048, 1055 (2d Cir. 1992) (citation omitted). However, it is a mixed question of law and fact as to which the Supreme Court has set forth a governing rule. While the Lindh approach would, therefore, require us to apply the deferential "unreasonable application" clause of § 2254(d)(1), the O'Brien approach would lead us to ask whether the decision of the state court was contrary to the governing rule set forth in Strickland. Nevertheless, we believe that a choice between those two approaches is not necessary in this case. For the reasons set forth below, we believe that the Appellate Division's application

of Strickland to this case was an unreasonable application. Because we cannot conceive of how a decision can be an unreasonable application of a rule but somehow be not contrary to that rule, we conclude that under either approach a writ of habeas corpus is warranted.

A. The Strickland Standard

To prevail on a claim of ineffective assistance of counsel, the petitioner must show, first, that his counsel's performance at trial "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In evaluating trial counsel's performance, courts must be "deferential," making "every effort . . . to eliminate the distorting effects of hindsight." *Id.* at 689. The "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* As a result, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Consequently, "the fact that counsel is prepared and familiar with the relevant facts and legal principles is usually sufficient to defeat a claim that trial counsel was ineffective." *Farrington v. Senkowski*, 19 F. Supp. 2d 176, 179 (S.D.N.Y. 1998) (quoting *United States v. DiPaolo*, 804 F.2d 225, 234 (2d Cir.1986)).

Secondly, if the Petitioner is able to show that his counsel's performance fell below an objective standard of reasonableness, he also must demonstrate that the performance caused him substantial prejudice. *See Strickland*, 466 U.S. at 691 (explaining that petitioner must show that ineffectiveness had an "effect on the judgment."). "The question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* In other words, counsel's errors must undermine our confidence in the trial's outcome. *Id.*

B. Noble's Counsel's Errors

In this case, Petitioner claims that his counsel was ineffective in four particulars: he (1) failed to provide the government with a notice of alibi defense; (2) failed to object to improper statements made by the prosecutor; (3) failed to obtain the testimony of Lt. Whalen; and (4) offered evidence for credibility purposes when it should have been offered as substantive evidence. The Appellate Division rejected Noble's argument on direct appeal, explaining only that it believed the challenge was a "simple disagreement with trial strategies and tactics." *See People v. Noble*, 209 A.D.2d 735, 618 N.Y.S.2d 123, 124 (N.Y. App. Div. 1994). The court also stated that the alleged errors did not amount to constitutionally defective representations "when viewed in totality." *Id.*

We believe that only one of counsel's alleged errors -- the failure to file the alibi notice -- entitles the Petitioner to relief. The other three errors are either unsupported by the record[22] or did

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[22] For example, Noble claims that his lawyer offered Yamagata's testimony about the Cat, Shaka, and Gary altercation for impeachment rather than as substantive evidence. Although the court seems to have excluded it on that basis, our review of the record reveals several instances in which counsel clearly stated that he was offering the evidence for substantive purposes. (*See* Tr. at 579, 580, 585, 593.) Similarly, the claim that counsel failed to object to improper comments made by the prosecutor is belied by the fact that counsel did object repeatedly. (*See, e.g., id.* at 870, 871, 877, 881, 885.) On a few occasions, those objections were sustained and prompted curative instructions. (*See, e.g., id* at 881, 885.)

not cause substantial prejudice.[23] With respect to the failure to file the alibi notice, however, we simply do not see how any reasonable jurist can attribute that failure to a strategic choice of trial tactics. To be sure, "the decision . . . to pursue a particular defense is a tactical choice," *Franza v. Stinson*, 58 F. Supp. 2d 124, 155 (S.D.N.Y. 1999), and there are numerous cases in which courts have rejected federal habeas challenges alleging that trial counsel failed to present alibi testimony, *see, e.g., Lawson v. Caspari*, 963 F.2d 1094, 1096 (8th Cir. 1992); *Allah v. Kelly*, 32 F. Supp. 2d 592, 599 (W.D.N.Y. 1998); *Nieves v. Kelly*, 990 F. Supp. 255, 264-65 (S.D.N.Y. 1997); *Munoz v. Keane*, 777 F. Supp. 282, 288-89 (S.D.N.Y. 1991). But those cases generally involved a decision not to pursue an alibi defense, which the reviewing court finds to have been reasonable. In this case, Noble's lawyer decided to pursue an alibi defense, but was unable to present that defense because of his misinterpretation of the governing discovery rules. In no sense, can that failure be attributed to a strategic choice. The decision made by Noble's trial counsel not to file an alibi notice was based on counsel's belief that Yamagata's testimony did not constitute an alibi -- a belief we are compelled to find to have been erroneous, *see supra* at 256. Errors caused by counsel's ignorance of the law are errors that run afoul of the objective standard of reasonableness. *See Kimmelman v. Morrison*, 477 U.S. 365, 385, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986) (rejecting argument that counsel's errors were strategic choices because they were based on ignorance of the law). Although research has not disclosed any New York cases that had been

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[23] Even if defense counsel's performance was objectively unreasonable in failing to produce Lt. Whalen as a witness, that error caused no prejudice since Nurse Hoar testified to the relevant conversation that Whalen would have, presumably, described.

decided as of the time of Noble's trial,[24] which directly address the question of whether the "scene of the crime" is defined by the Indictment or by the Government's discovery responses, nor any cases indicating that testimony that the accused was inside a building when the crime occurred outside is an alibi, we believe that the plain language of the statute[25] would lead any reasonably competent lawyer to err on the side of caution by filing the requisite notice. Counsel's failure to do so here was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Moreover, Noble clearly suffered substantial prejudice as a result. As set forth above, *see supra* Part II(C), the prosecution's contention that Melvin Walker testified to the same alibi is not supported by the record and, even if it were, would be inadequate in light of the strong challenges to Walker's credibility that were made by the prosecution. We are unable to conclude, as we must to find a lack of prejudice, that the trial court's exclusion of Yamagata did not effect the verdict. That exclusion, caused by trial counsel's misinterpretation of state discovery rules, undermines our confidence in the verdict and, therefore, leads us to conclude that the performance of Noble's trial counsel was constitutionally deficient. Ineffective assistance

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[24] At least one decision rendered after Noble's trial, *People v. Rosado*, 153 Misc. 2d 477, 583 N.Y.S.2d 130 (N.Y. Sup. Ct. 1992), reached the same conclusion as the trial court in this case, i.e., that testimony that a defendant was inside a building when a crime allegedly occurred outside the building constituted an alibi and required notice, *see* 583 N.Y.S.2d at 131, but that a defendant's own alibi testimony could not be stricken.

[25] *See* supra note 7.

of counsel, therefore, is an alternative ground for our decision to grant Noble's petition and issue a writ of habeas corpus.

IV. PROSECUTORIAL MISCONDUCT

Petitioner cites four instances of prosecutorial misconduct that, he alleges, deprived him of a fair trial. He claims that the prosecutor (1) told the jury he was a member of a drug gang without there being any basis in the record, (2) asked leading questions, (3) stated his personal beliefs, and (4) disregarded the court's instructions. Federal law applies to claims for prosecutorial misconduct through the Due Process Clause. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) (federal review of state prosecutors' conduct is "the narrow one of due process, and not the broad exercise of supervisory power that it would possess in regard to its own trial court.") (internal quotation marks and citation omitted); *see also Tankleff v. Senkowski*, 135 F.3d 235, 252 (2d Cir. 1998) ("In order to grant relief, we would have to find that the prosecutor's comments constituted more that mere trial error, and were instead so egregious as to violate the defendant's due process rights.") (citations omitted). To grant relief, then, we must conclude that the Appellate Division's decision was an "unreasonable application" of the Due Process Clause.

The Due Process Clause would justify habeas corpus relief due to prosecutorial misconduct only if that misconduct was so severe as to cause an unfair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) ("not every trial error . . . constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice"); *Tankleff v. Senkowski*, 135 F.3d 235, 252 (2d Cir. 1998) (petitioner "must show 'that he suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the

jury's verdict.") (quoting *Bentley v. Scully*, 41 F.3d 818, 823 (2d Cir. 1994)); *United States v. Bautista*, 23 F.3d 726, 732 (2d Cir. 1994) (explaining that petitioner must show misconduct and "substantial prejudice") (citations omitted). After examining the record, the Appellate Division concluded that the examples of prosecutorial misconduct cited by Mr. Noble were not "so pervasive and egregious as to deprive defendant of a fair trial." *People v. Noble*, 618 N.Y.S.2d at 124. We agree. The record reveals numerous instances in which the trial court sustained objections to the prosecutor's conduct and instructed the jury appropriately. (*See, e.g.*, Tr. at 116, 139, 143, 875, 885, 921.) These kind of curative efforts made by the trial court are generally sufficient to satisfy the Due Process Clause. *See* Tankleff, 135 F.3d at 252. More specifically, one of the examples of misconduct cited by the Petitioner Mr. Noble -- references to drugs without a basis in the record -- has been reviewed by a federal court on at least two occasions and found to not constitute a violation of due process. *See Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994); *Bautista*, 23 F.3d at 732. We do not conclude, therefore, that the Appellate Division's conclusion was an "unreasonable application" of the Due Process Clause, nor was it contrary to any governing rule articulated by the Supreme Court.

CONCLUSION

Noble's petition for a writ of habeas corpus is granted on the ground that the preclusion of exculpatory testimony violated the Compulsory Process Clause and, in the alternative, on the ground that defense counsel's failure to file notice of an alibi defense deprived Noble of the effective assistance of counsel. The petition is denied on the ground of prosecutorial

misconduct.[26] Respondent is directed either to release the Petitioner from custody or to retry him within 90 days of this order. This order shall be stayed pending appeal, provided that Respondent files a Notice of Appeal within 30 days of this order.

SO ORDERED.

Dated: New York, New York

February 28, 2000

Leonard B. Sand

U.S.D.J.

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[26] We have reviewed Petitioner's additional claims and find them to be without merit.

Supreme Court, Appellate Division,
Third Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Casim NOBLE, Appellant.

Richard J. Haas, Swan Lake, for appellant

Stephen F. Lungen, Dist. Atty. (Bonnie M. Mitzner, of counsel), Monticello, for respondent.

Before MIKOLL, J.P., and MERCURE, YESAWICH and PETERS, JJ.

PETERS, Justice.

Appeal from a judgment of the County Court of Sullivan County (Kane, J.), entered May 17, 1991, upon a verdict convicting defendant of the crimes of attempted murder in the second degree, criminal use of a firearm in the first degree (two counts) and criminal possession of a weapon in the second degree.

This is the last of a triune of appeals by three defendants emanating from the shooting of Dwight Usher outside a bar in Sullivan County in September 1989. All three were indicted and jointly tried on charges of attempted murder in the second degree, assault in the first degree, two counts of criminal use of a firearm in the first degree, and criminal possession of a weapon in the second degree. They were convicted on all charges except assault in the first degree. In *People v. Pittman*, 189 A.D.2d 918, 592 N.Y.S.2d 812, *lv. denied*, 81 N.Y.2d 891, 597 N.Y.S.2d 953, 613 N.E.2d 985, and *People v. Middleton*,

192 A.D.2d 740, 596 N.Y.S.2d 177, *lv. denied,* 83 N.Y.2d 913, 614 N.Y.S.2d 395, 637 N.E.2d 286, this court affirmed the convictions of the codefendants. Here, defendant contends that County Court erred in precluding one of his witnesses from testifying that he was not a participant in the shooting because he was inside the bar at the time, that he was denied effective assistance of counsel and that prosecutorial misconduct denied him a fair trial.

As to the preclusion of his witness from testifying, defendant does not deny that he failed to serve the requisite CPL 250.20 notice of alibi, but he contends that the proffered evidence was not alibi evidence as it did not seek to place him at a location other than the scene of the crime. Even if we were to find that County Court committed error when it precluded this testimony, we conclude that such error would [209 A.D.2d 736] be harmless in view of the overwhelming evidence of guilt (*see, People v. Peralta,* 127 A.D.2d 803, 512 N.Y.S.2d 201, *lv. denied,* 69 N.Y.2d 953, 516 N.Y.S.2d 1037, 509 N.E.2d 372, *People v. Ruiz,* 159 A.D.2d 656, 553 N.Y.S.2d 173, *lv. denied,* 76 N.Y.2d 742, 558 N.Y.S.2d 904, 557 N.E.2d 1200; *People v. Bonomo,* 47 A.D.2d 862, 366 N.Y.S.2d 42).

We find equally unpersuasive defendant's contention that he was deprived of effective assistance of counsel. Defendant's arguments that center on counsel's allegedly ineffective performance are not substantiated in the record and do not equate to ineffective assistance as we have already held in both *People v. Pittman* (*supra*) and *People v. Middleton* (*supra*). The wisdom of hindsight is always advantageous (*see, People v. Aiken,* 45 N.Y.2d 394, 399, 408 N.Y.S.2d 444, 380 N.E.2d 272), but simple disagreement with trial strategies and tactics does not prove ineffectiveness (*see, People v. Wright,* 206 A.D.2d 750, 614 N.Y.S.2d 818, 821). When viewed in totality, as we must do, counsel's representation satisfied the well-

established criteria set forth in *People v. Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400; *see also, People v. Hope*, 190 A.D.2d 958, 959, 594 N.Y.S.2d 360, *lv. denied*, 81 N.Y.2d 972, 598 N.Y.S.2d 773, 615 N.E.2d 230.

Finally, we reject the allegation that prosecutorial misconduct during trial and summation were so pervasive and egregious as to deprive defendant of a fair trial (*see, People v. Gonzalez*, 206 A.D.2d 946, 615 N.Y.S.2d ***125.** 191; *People v. Gutkaiss*, 206 A.D.2d 628, 614 N.Y.S.2d 599).

ORDERED that the judgment is affirmed.

MIKOLL, J.P., and MERCURE and YESAWICH, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

DERRICK PITTMAN, CASIM NOBLE and
RUFUS MIDDLETON,

Defendants.

----------x

March 18, 19, 1991

BEFORE:
The Honorable ANTHONY T. KANE

and a JURY.

Robert Hantman, C.S.R.
Courthouse
Monticello, New York 12701
(914) 794-4260 or 434-4404

THE COURT: Okay. Are you ready?

MR. SCHULMAN: Mr. Flynn wants to call Steven Yamagata as his next witness.

(Discussion off the record)

MR. LUNGEN: I think we are entitled to, at the very least, some offer of proof before we get into the collateral of another guy in Jail and his history.

THE COURT: Do you have a list of witnesses?

MR. FLYNN: It's on the –

THE COURT: The criminal history and prior bad acts?

MR. FLYNN: No convictions. He's in jail for criminal possession of a controlled substance, and he was there that night.

(Discussion off the record)

THE COURT: You're going to call Steven Yamagata and he's going to testify to what?

MR. FLYNN: That he was there that night and he saw the prior fight between Cat, Shaka and Gary, and that he was inside the bar when he heard the shots, and he was playing pool or some other game in there, and Casim was playing the video game, and they both exited the bar together.

THE COURT: Right. And why isn't that an alibi?

MR. FLYNN: It's on the scene of the crime. It's 25 yards away.

THE COURT: The scene of the crime as 25 yards away. The intent of that statute is to give notice that one of the defendants claims to be in a location other than –

MR. FLYNN: He is in a location. Whether it's outside or inside, it's 20 yards away. I'm not putting him in New York City or anything.

MR. LUNGEN: An apartment A and Apartment B are in the same location, this is as thick as the wall. That's an alibi, my friend. Let the record reflect, I served alibi notice on every defendant 15 days after arraignment. It's been a year and a half, one year and half, there hasn't even been as much as a response by any of the defendants on alibi notices.

THE COURT: I saw the alibis in the files. To me, this is an alibi, this is clearly an alibi. "I wasn't at the scene of the shooting, I was somewhere else and I've got a witness to place me there, and the somewhere else, whether it be 20 feet away or a hundred feet away or in the next county, is still somewhere else, and I've got a witness to place me there."

MR. FLYNN: It's in the same vicinity as the bar.

THE COURT: It's behind a door and in a building, and the action occurred or is alleged to have occurred out in the parking lot. If you've got something that indicates that that's anything but an alibi, I'll be happy to hear about it.

MR. FLYNN: The indictment says in the vicinity of the Around the Corner Bar.

MR. LUNGEN: The statute requires, if I can read it, 250.20, within eight days after –

THE COURT: I know –

MR. LUNGEN: Reciting. Your response has to recite A, the place or places the defendant claims to have been at the time in question, and the names, residential addresses of everyone on which it tends to rely, and it's very clear the place or places that defendant claimed to have been at the time of question. The time of questioning is at the time of shooting at the Around the Corner Bar, and they haven't responded. The Bill of Particulars says it, the motion practice says it, the facts say it.

MR. FLYNN: Your remedies, you can have your three days.

MR. LUNGEN: The case law also says in the Court's discretion it can say no.

THE COURT: You can let me have that information by tomorrow morning as to what – I understand your argument.

Do you have anything else that would show that this is not an alibi?

MR. FLYNN: Just part of the record, in the vicinity of --

THE COURT: All right. Do you want to take a couple minute about calling this next witness?

MR. SCHULMAN: Yes.

THE COURT: I'm not interested in three days. We've been on trial for a day and a half.

(Discussion off the record)

(Court reconvened at 4:54 p.m.)

THE COURT: Mr. Flynn, as I indicated to you a few minutes ago off the record, I reviewed the court file, and it appears that there is in response to the 20-day order signed with respect to your client, the response was that the incident complained of in this case took place in front of the Around the Corner Bar. "In front of" is what it says, so be prepared to address the question of alibi in the morning, I'll certainly hear what you've got to say.

MR. FLYNN: For the record, the defendant contends that alibi is elsewhere, and that he was not a distant place from the bar, he was in the bar, only about 20 yards away, and that the notice was not necessary.

THE COURT: That's your position?

MR. FLYNN: Yes, Judge. And second is that we are still calling Steven Yamagata, as far as testifying about the earlier fight.

* * *

March 19, 1991

(Court reconvened at 9:44 a.m.)

THE COURT: On the application for a severance made by the defendants Pittman and Middleton, the fact that one of the defendants may call a witness who may present some evidence that may be harmful to one or more of the defendants is not a basis for a severance, and the Court will deny that application.

Mr. Flynn, I had indicated to you yesterday that I would take any law that you wish to submit on the alibi question?

MR. FLYNN: No, Judge. Everything was said on the record.

MR. LUNGEN: Your Honor, you know my position. There's case law that gives authority to the Court to deny it. I haven't done extensive research, but real quickly, a couple of Second Department cases, I can cite those to the Court if it feels it needs them.

THE COURT: No. I've done some research on it also. This Court will preclude giving testimony with respect to the alibi. The record indicates that no notice was served by the defense that they intended to produce an alibi witness. The first that the People were advised of their intention to call this witness was after the close of the People's case yesterday.

The record further indicates, pursuant to the discovery statements by the District Attorney in response to the 20-day order of the motion judge, that the scene of this

crime was in front of the Around the Corner Bar. This being the case, the testimony of this witness that the defendant was inside the bar at the time of the shooting is clearly an alibi witness.

The Court is not satisfied that there is an acceptable reason for not making this application sooner.

MR. FLYNN: Your Honor, we still intend to call Mr. Yamagata. Before I put him on as a witness, I will advise him that he is not to say anything about the location of Casim during the shooting, because it might slip out; so I will advise him, and you have my assurance of that. But I'm calling him concerning testimony of what went on that night before the shooting.